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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	**:**	
On Its Own Motion	**:**	
	:	**01-0539**
Implementation of Section 13-712(g) of the	**:**	
Public Utilities Act.	**:**	

POST EXCEPTIONS PROPOSED ORDER

By the Commission:

The Commission commenced this rulemaking proceeding on August 8, 2001, to implement the directive in Section 13-712(g) of the Public Utilities Act (the "Act") that "[t]he Commission shall establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules." (220 ILCS 5/13-712(g)).

Leave to Intervene was granted to the following parties: SBC Illinois, ("SBC"), Allegiance Telecom of Illinois, Inc., ("Allegiance") AT&T Communications of Illinois, Inc., TCG Chicago, Inc., and TCG St. Louis, Inc., (collectively "AT&T") Citizens Telecommunications Company of Illinois, ("Citizens") Gallatin River Communications, L.L.C., Illinois Telecommunications Association, ("ITA") Verizon North Inc. and Verizon South Inc., (jointly, "Verizon") Illinois Consolidated, 21st Century, MCI World Com, ("WorldCom") McLeodUSA Telecommunications Services, Inc., ("McLeod") Nuvox Communications of Illinois, Inc., ("Nuvox") RCN Telecom Services of Illinois, Inc., ("RCN") TDC Metrocom, L.L.C., ("Metrocom") the Illinois Independent Telephone Association ("IITA"), Focal Communications Corp., ("Focal") XO Illinois, Inc., ("XO") the Ilinois Rural Competitive Alliance, (the "IRCA") Sprint Communications L.P., PrimeCo Personal Communications, U.S. Cellular, Inc. and VoiceStream Wireless Corp., (collectively, the "Wireless Coalition") and the Commission Staff ("Staff").

Workshops were held on August 30, 2001; September 26, 2001; October 16, 2001; November 7, 2001; January 23, 2002; March 7, 2002; and June 11, 2002. Evidentiary hearings were conducted on July 23 and 24, 2002, and August 13, 2002. At the hearing, the testimony of the witnesses set forth below admitted into the record: David Meldazis, Senior Manager of Regulatory Affairs of Focal, on behalf of Focal; Rod Cox, Manager, Carrier Relations, TDS Metrocom, in support of TDS Metrocom, McLeod, Nuvox and RCN (collectively, "Allegiance.") In support of the IRCA, Jason P. Hendricks, Senior Consultant, GVNW consulting, testified. In support of AT&T, Karen Moore, Manager of Performance Measures, Local Services and Access Management, testified.

In support of WorldCom, the following witnesses testified: Karen Furbish, Principal Analyst, Access Services, at WorldCom, and Faye Raynor, Director of Regulatory Support, Wholesale Performance Assurance. In Support of Verizon, the following witnesses testified: Louis Agro, Director of Verizon's Wholesale Performance Assurance Group; and Jerry Holland, Vice-President of Process Improvement at Verizon.

In support of the Wireless Coalition, the following witnesses testified: Carl Hansen, of Hansen Communications Consulting, David Schmoker, Manager of the Regional Network Engineering Department of U.S. Cellular, Inc., Doug Blake, Director of Network Operations of U.S. Cellular, Inc., Rajesh Tank, Executive Director of Engineering and Operations, Voice Stream Wireless; Lester M. Tsuyuki, Manager of the Telecommunications and Regulatory Department of PrimeCo Personal Communications; and Robert J. Jakubek, Director of Operations, U.S. Cellular., Inc. In support of Citizens, the following witnesses testified: Kim Harber, Citizens' Vice-President and General Manager, and Kenneth Mason, Citizens' Manager of Interconnection. The following witnesses testified on behalf of SBC: Richard Dobson, the Director of Network Performance at SBC; Eric Panfil, Director of Network Technologies and New Services, SBC Illinois, and James Ehr, Director, Performance Measures for SBC; and Terry Spieckerman, Business Service Representative at SBC Illinois.

The following witnesses testified on behalf of Staff: Samuel McClerren, Engineering Analyst in the Commission's Engineering Department of its Telecommunications Division; Russell Murray, a Utility Analyst in the Commission's Telecommunications Division; Alcinda Jackson, a Consumer Policy Analyst in the Commission's Consumer Services Division; Kathy Stewart, an Engineering Analyst in the Commission's Telecommunications Division; Melanie Patrick, Ph.D., a Policy Analyst in the Policy Division of the Commission's Telecommunications Department. At the conclusion of the hearings, the record was marked "heard and taken."

The previously-mentioned parties filed post-trial briefs and post-trial reply briefs. The Administrative Law Judge's Proposed Order (the "ALJPO") issued on April 11, 2003. On May 27, 2003, SBC, Verizon, the IRCA, AT&T, Citizens, the Wireless Coalition, McLeod[1] and Commission Staff filed Briefs on Exception. These parties filed Reply Briefs on Exception on June 27, 2003.

On July 21, 2003, SBC, Verizon and other parties filed a joint motion asking the ALJ to consider modifying the definition of "Wholesale Service Emergency Situation" to conform to definitions that were recently amended in rulemaking proceedings regarding Parts 730 and 732, which also concern LEC service quality. This issue was fully briefed by the moving parties and Staff. On August 27, 2003, the ALJ issued an order asking the

[1] The Level 4 carriers filing a group Brief on Exceptions were McLeod USA, Nuvox Telecommunications, RCN Telecom, and TDS Metrocom. They are collectively referred to herein as "McLeod."

parties to brief the impact, if any, of the FCC's *Triennial Review Order* on the issues in these proceedings. SBC, Verizon, Allegiance, the IRCA, Citizens and Commission Staff filed briefs and reply briefs on this issue.

The text of the proposed rule that was initiated by Staff was initially presented as Attachment 1.1 to the direct testimony of Staff witness Samuel S. McClerren. The parties subsequently introduced several modifications to that rule. For the sake of brevity, this Order discusses the last proposal Staff made on any portion of the Rule, and any modification proposed by a party in a brief. Also for the sake of brevity, only the subsections of Sections of Part 731 are cited herein. For example, Section 731.105 is referred to as Section 105.

Background: The General Framework of the Rule

The Rule proposed by Staff establishes ~~has~~ four "tiers" of telecommunications carriers, or "Levels." The carriers that provide the bulk of the ~~most~~ wholesale service, the Incumbent Local Exchange Carriers ("ILECs") with 400,000 or more access lines, (SBC and Verizon) are Level 1 carriers. All other ILECs, (except carriers subject to the rural exemption) of which, there are three in Illinois, are Level 2 carriers. ILECs that are subject to the rural exemption are classified as Level 3 carriers. All other LECs, or CLECs, ("Competitive Local Exchange Carriers") are classified as Level 4 carriers.

The Rule requires Level 1 carriers, who already have Wholesale Service Quality Plans that were developed as a result of merger commitments, (SBC and Verizon) to have a Commission-approved Wholesale Service Quality Plan that meets certain requirements and criteria set forth in the Rule. The Rule further provides a procedure for Commission approval of, and periodic review of, such Plans.

With respect to Level 2 carriers, the set of measures imposed by the Rule are more limited than those found in Level 1 Wholesale Service Quality Plans. The Rule does not impose any performance measures on Level 3 carriers, except when such carriers loose their rural exemption. Level 4 carriers, who provide little wholesale service, are subject to three performance measures, standards and some remedies.

The Rule contains performance measures and standards. A measure identifies the attribute of a wholesale service that is being measured. A performance standard identifies the required performance level. These measures and standards evolved after extensive workshops; they continued to evolve through the course of this proceeding. Generally, the measures and standards concern timeframes for provisioning services, for maintenance and repair and for the transition that occurs when and end user customer switches carriers. These standards also determine ~~concern~~ what information a carrier must supply to another carrier in given situations. Failure to meet the standards can result in a payment, or in the issuing of a credit on a future bill, depending on the measure breached. However, the Rule also provides that carriers are excused from performance within designated timeframes, if failure to perform was due to a circumstance beyond the provisioning carrier's control, such as a tornado, an act of terrorism, or the actions of the end user.

I. Issues Applicable to All Carriers

a) Section 105: Exclusion of the Definition of "Adopt."

Staff's proposed Rule included a definition of the term "Adopt. " It provided that the words "adopt" or "adopted" "shall mean, in addition to their customary and usual meaning, approve or approved." (Appendix, Section 105). This provision was deleted in the version of the Rule that was attached to the Administrative Law Judge's Proposed Order, (the "ALJPO") as it added nothing; the ordinary meaning of the word "adopt" is to "approve." (Webster's New World Dictionary, 8th ed., 1960, at 20).

The Position of Staff

Staff objects to deletion of the definition of "adopt." Staff contends that this word appears in the Rule many times and therefore, exclusion of the definition could lead to confusion.

The Position of SBC

SBC contends that the definition of the word "adopt" is not needed. (SBC Brief on Exceptions at 5).

Commission Analysis and Conclusions

Rather than define the word "adopt" in the Rule with its plain ordinary meaning, (to "approve") the approach that would better address Staff's concern that deletion of the definition of "adopt" would lead to confusion would be to change the word "adopt, as it appears in the Rule, with the word "approve." Therefore, the definition of "adopt" in the Rule will remain deleted but, the word "adopt" in the Rule will be changed to "approve."

b) Section 105: AT&T's Revised Definition of "Resold Local Services"

The Position of AT&T

AT&T seeks to amend the definition of "Resold Local Services" to conform with ~~be identical to~~ the definition found in the Section 13-211 of the Public Utilities Act, (the "Act") which provides that resold telecommunications services are the "offering or provision of telecommunications services primarily through the use of services or facilities owned or provided by a separate telecommunications carrier." (220 ILCS 5/13-211) (AT&T Initial Brief at 14; *See also,* Appendix, Sec. 105).

The Position of Staff

The ALJPO adopted The Position of AT&T and changed the definition of "Resold Local Services." On Exceptions, Staff objects to this change. Staff contends that AT&T's definition would make any sale of a UNE subject to the measures and standard in Section 610(a)-(e), which was not contemplated or intended by the parties. Because the standards in Section 610(a)-(c) were meant to be limited to the typical combination of unbundled network elements ("UNEs") used to provision local service, Staff opines that there is no reason to apply the standards for resold local services, and associated remedies, to each and every UNE and UNE combination sold by a Level 2 carrier. (Staff Brief on Exceptions at 5). Staff further argues that the definition in Section 13-211 of the Act should not be used here because it defines the relationship between a carrier and an end user customer, which is not appropriate in the wholesale context. (Staff Reply Brief on Exceptions at 4).

Commission Analysis and Conclusions

Staff correctly points out that the definition of "Resold Local Services" in Section 13-211 only describes the relationship between a carrier and an end user. Therefore, this definition is not appropriate in the wholesale context. Staff's definition more accurately describes resold local services in the wholesale context. The definition of resold local services will be amended to provide that:

> 'Resold Local Services' means the sale, for purposes of resale, of a complete telecommunications path (i.e., switch, port, and loop) and associated support (e.g., 911) by a facilities based carrier to another carrier.

~~Currently, the Rule provides that Resold Local Services are "[t]he sale, for purposes of resale, of a complete telecommunications path (i.e., switch, port, and loop and associated support (e.g., 911, OS/DA) by a facilities based carrier to another carrier." (Appendix, Sec. 105). We agree with AT&T that its definition, which is wider, and is therefore, more all-inclusive, is the better definition of "Resold Local Services." Moreover, we should avoid possible discrepancies between the Rule and statutes.~~

~~Section 105 will be amended to provide that Resold Local Services are:~~

> ~~the offering or provisioning of telecommunications services primarily through the use of services or facilities owned or provided by a separate telecommunications carrier.~~

c) Section 105: Citizens' Revised Definition of "Telecommunications Carrier"

The Position of Staff

~~Currently,~~ The Rule proposed by Staff includes advanced services in its requirements concerning unbundled local loops. (*See, e.g.,* Appendix, Section 105).

The Position of Citizens

Citizens seeks to revise the definition of "telecommunications carrier" in Section 105 to exclude advanced services as follows:

> 'Unbundled Local Loop' means the physical connection for the end user's premise to the carrier's point of presence, excluding switching or ports, provided by one carrier to another carrier. For purposes of this Code Part 731, Unbundled Local Loop is limited to analog loops used to provide 'basic local exchange services' as defined in 220 ILLCS 5/13-712(b).

(Citizens' Initial Brief at 11).

The Position of the IRCA

The IRCA posits that the General Assembly's omission of the term "basic local exchange services" from Section 712(g) evinces ~~establishes~~ a legislative intent to adopt wholesale service quality standards for more than just loops used to provide basic local exchange services. It concludes that the telecommunications services covered by the Rule should not ~~be defined to~~ exclude loops for advanced services. (IRCA Reply Brief at 10).

Commission Analysis and Conclusions

Whether Section 712(g) permits this Commission in to include ~~The issue of~~ advanced services in the Rule ~~with regard to unbundled local loops~~ is fully addressed in Section IV(h) herein, the portion of this order that is entitled "Unbundled Local Loops for Advanced Services." For the reasons set forth in that Section of the Order, we decline to restrict the definition of unbundled local loops to exclude advanced services.

d) Section 105: Citizens' Revised Definitions of "Wholesale Service" and "Carrier to Carrier Wholesale Service Quality"

The Position of Citizens

Citizens seeks to Revise Section 105 to provide:

> 'Carrier to carrier wholesale service quality' means the level of quality of telecommunications service, measured pursuant to the Standards and Measures adopted in this Part, that one telecommunications carrier sells or provides to another telecommunications carrier pursuant to an interconnection agreement for the latter carrier's use in providing basic local exchange service to end users.
>
> 'Wholesale Service' means any telecommunications service that one telecommunications carrier sells or provides to another telecommunications carrier pursuant to an interconnection agreement for use in providing basic local exchange services to end users.

(Citizens' Initial Brief at 11).

The Position of the IRCA

The IRCA maintains that ILECs are required to provide unbundled network elements to CLECs, ("UNEs") irrespective of whether there is an interconnection agreement between the two. Thus, the IRCA concludes that the Rule should not limit the definitions of "carrier to carrier wholesale service quality" and "wholesale services" to situations ~~including~~ involving interconnection agreements. The IRCA also contends that the definition of "wholesale services" in the Rule should not be limited to basic local exchange services, as the General Assembly omitted "basic local exchange services" from the enabling statute, Section 712(g). It reasons that because this term is absent from the enabling statute, the Rule is not limited to "basic local exchange services." (IRCA Reply Brief at 9-10).

Commission Analysis and Conclusions

Citizens seeks to limit the scope of this docket to services that are, in and of themselves, "basic local exchange services." Section 11(g)(2) discusses the arguments concerning the scope of this proceeding as it relates to wholesale special access service. For the reasons stated in Section II(g)(2), we conclude that the Rule does not merely govern those services that are used to provision "basic local exchange services." ~~which is not the same thing as what Citizens proposes.~~ We decline to alter the definitions of "carrier to carrier wholesale service quality" and "wholesale services" in a manner that limits those definitions to basic local exchange services."

We also decline to add language to the definition of wholesale service that *requires* interconnection agreements. Placing language regarding the interconnection process in the definition of "wholesale services" is confusing, at best. ~~We see no need to require that the parties enter into a formal interconnection agreement to memorialize their respective duties and obligations.~~

e) Section 105: WorldCom's Revised Definition of "Wholesale Service"

The Position of WorldCom

The Rule defines "wholesale service" as:

> Any telecommunications service subject to the Commission's jurisdiction that one carrier sells or provides to another carrier, as a component of, or for the provision of, telecommunications services to end users.

(Appendix, Sec. 105).

WorldCom seeks to delete the phrase "subject to the Commission's jurisdiction" from that definition. WorldCom argues that deleting this phrase ~~such deletion~~ should allow the Commission to review and evaluate Level 1 carriers' performance in providing interstate special access services, as well as intrastate special access services. (WorldCom Initial Brief at 3-4). Without the ability to review this data, WorldCom reasons, the Commission and purchasers of wholesale special access services will be unable to determine if Level 1 carriers are discriminating against their wholesale customers when provisioning such services. Also, according to WorldCom, the Commission will be unable to review the performance that impacts upon services provided to the Illinois end user customers that rely on Level 1 carrier interstate special access circuits. WorldCom points out that special access circuits may technically be interstate services, even when they carry as much as 90% intrastate traffic and are physically located wholly within the state. (*See,* WorldCom Ex. 1.0 at 4-5). WorldCom urges the Commission to join the growing number of state Public Utility Commissions that have required ILECs to report both intrastate and interstate special access performance. (*Id.* at. 8).

In its Brief on Exceptions, WorldCom contends that the definitions of "Wholesale Services" and of "Wholesale Special Access" in the ALJPO should be changed, because the Order incorrectly concludes that this Commission does not regulate interstate services. WorldCom asks the Commission to impose reporting requirements on interstate special access, as well as intrastate special access services. According to WorldCom, Staff's assessment that the majority of special access circuits used by competing carriers in Illinois are intrastate is wrong. It concludes that its proposed measures, which were rejected in the ALJPO for lack of evidence establishing their feasibility, should be adopted by the Commission. (WorldCom Brief on Exceptions at 2-6). WorldCom further concludes that there is a dire need for Commission regulation of interstate special access services, and, there are no legal impediments that would prevent the Commission from regulating such services. (WorldCom Brief on Exceptions at 6-10).

The Position of Staff

Staff opines that the Rule should only encompass services subject to the Commission's jurisdiction. (Staff Brief on Exceptions at 6). Staff posits that the FCC has initiated a rulemaking in which it is considering permitting state commissions to implement and enforce standards governing interstate special access services, *In the Matter of Performance Measurement and Standard for Interstate Special Access Services,* CC No. 01-0339). Staff notes that the Rule, as proposed, would permit this Commission's jurisdiction to be similarly expanded, without any further action on the part of the Commission, should the FCC decide to expand this Commission's jurisdiction. (Staff Initial Brief at 76).

Commission Analysis and Conclusions

The current definition of wholesale services is:

> [A]ny telecommunications service subject to the Commission's jurisdiction that one carrier sells or provides to another carrier, as a component of, or for the provision of, telecommunications service to end users.

(Appendix, Sec. 105). As Staff points out, the current definition addresses the need for flexibility, should this Commission's jurisdiction expand in the future.

We decline to adopt WorldCom's definition of "Wholesale Service." The only reason mentioned by WorldCom for the change is the additional reporting requirements regarding interstate services, which may be beyond our jurisdiction ~~we do not regulate~~ at this point in time. We decline at this time to require such reporting requirements.

Further, we see no need at this time to determine whether we should assert jurisdiction over interstate special access services. Irrespective of whether this Commission is legally prevented from regulating such interstate services, there is no factual support for WorldCom's argument that most of the circuits used by the CLECs are interstate, and not intrastate. Moreover, WorldCom provides no factual basis for its claim that this Commission should impose reporting requirements on ILECs for interstate special access services.

f) Section 105: SBC's Proposal to Change the Definition of "Maintenance and Repair"

The Position of SBC

SBC seeks to delete the phrases "view status history" and "receive proactive status on trouble reports" from the Rule's definition of "Maintenance and Repair" in Section 105. SBC argues that these phrases add nothing to the Rule. (SBC Initial Brief at 30).

The Position of Staff

Staff opposes deleting the phrases cited above because, according to Staff, those phrases help explain what is contemplated by "maintenance and repair." However, Staff is willing to provide additional clarification; it proposes the following revised language:

> 'Maintenance and Repair' means the actions taken or functions used to create trouble reports, view <u>or determine trouble report status, and trouble report history</u>, receive proactive status <u>on trouble</u> reports, and clear and close trouble reports.

Commission Analysis and Conclusions

It appears that Staff has re-phrased this definition to address SBC's concern. Staff's revised definition of "Maintenance and Repair" in Section 105 Rule will be adopted. (Appendix, Sec. 105)

g) Wholesale Service Emergency Situations

<u>Background</u>

<u>The Rule, as originally proposed by Staff, defines a "Wholesale Service Emergency Situation" in a manner that could be construed as less than neutral on the subject of strikes or other work stoppages.</u>

<u>The Stipulation</u>

<u>After the Record was marked "Heard and Taken" and after issuance of the Proposed Order, SBC, Verizon and other parties filed a Motion asking the Administrative Law Judge (the "ALJ") to consider changing the definition of "Wholesale Service Emergency Situation" in order to be consistent with the language in Parts 730 and 732, which also concern LEC service quality. The parties asked the ALJ to take administrative notice of the language in a stipulation that was submitted to the Commission in docket 02-0426, which concerned Part 732. The ALJ took administrative notice of the stipulation and allowed the parties the</u>

opportunity to respond to this Motion, and Staff presented certain changes to the language in the stipulation. No other party filed a Response to this Motion and no party Replied to Staff's Response.

In docket 02-0426, the Commission concluded that the definition in Part 732 of "Wholesale Service Emergency Situation" should be clearly neutral as to whether a strike or a work stoppage constitutes such an emergency. The stipulation has the same definition of "wholesale Service Emergency Situation" as that which is contained in Section 105 of the Rule, except that the in the stipulation, all reference to strikes and work stoppages are deleted; it also has a few other relatively minor changes; and has the following added paragraph:

> This Part shall be construed as being content neutral as to whether a strike or other work stoppage is a "wholesale service emergency situation." In the event of a strike or other work stoppage, the local exchange carrier's obligations to provide remedies under this Part shall, in the absence of a decision by a court of competent jurisdiction, be determined by the Commission on a case-by-case basis based upon the individual factual circumstances of each strike or other work stoppage. In making such a determination, and notwithstanding the definition of "wholesale service emergency situation" above, the Commission shall not presume that a strike or other work stoppage is an act of an employee or of the local exchange carrier.

(Motion for Leave to File Corrected Exhibit, Exhibit 2).

Staff's Changes to the Stipulation

Staff seeks to add the following sentence:

> Notwithstanding anything to the contrary contained herein, a carrier shall not treat a strike or other work stoppage as a wholesale service emergency situation for reporting purposes unless and until a determination is made that such strike or other work stoppage constitutes a wholesale service emergency situation.

Staff maintains that this sentence is necessary to make it clear that the language added by the stipulation does not create an exception to the reporting requirements under Part 731, unless a determination is made that a strike or other work stoppage constitutes a wholesale service emergency situation. Staff also seeks to add the following language: "carrier who is claiming that the interruption of service is due to an emergency situation" instead of "carrier," which clarifies which carrier is at issue. Finally, Staff recommends changing the word "provide" to "pay." (Staff Response to Motion to Reopen the Record, p. 4).

Commission Analysis and Conclusions

We agree with the parties that the language in Part 731 should be consistent with Parts 730 and 732. We also agree with Staff's changes, except one, as those changes, except the change regarding changing the word "provide," clarify the Rule and they make the definition at issue more harmonious with the rest of Part 731. However, we do not agree with Staff that the word "provide" should be changed to "pay." The word "pay" connotes the use of money; however, the remedies in the Rule are not always in the form of money. Therefore, use of the word "pay" instead of "provide" could be confusing. The Rule will be amended to read as follows:

> 'Wholesale service emergency situation' means a single event that causes an interruption of service or installations affecting wholesale service provided by a carrier. The emergency situation shall begin with the first carrier whose wholesale service is interrupted by the single event and shall end with the restoration or installation of the service of all affected carriers. The term "single event" shall include:
>
> > a declaration made by the applicable State or federal governmental agency that the area served by the local exchange carrier is either a State or federal disaster area; or
> >
> > an act of third parties, including acts of terrorism, vandalism, riot, civil unrest, or war, or acts of parties that are not agents, employees or contractors of the local exchange carrier~~, or the first 90 calendar days of a strike or other work stoppage~~; or
> >
> > a severe storm, tornado, earthquake, flood or fire, including any severe storm, tornado, earthquake, flood or fire that prevents the local exchange carrier from restoring service due to impassable roads, downed power lines, or the closing off of affected areas by public safety officials.
>
> The term "wholesale service emergency situation" shall not include:
>
> > a single event caused by high temperature conditions alone; or a single event caused, or exacerbated in scope and duration, by acts or omissions of the local exchange carrier, its agents, employees
> >
> > or contractors or by the condition of facilities, equipment, or premises owned or operated by the local exchange carrier who is claiming that the interruption of service is due to an emergency situation; or any service interruption that occurs during a single event listed above, but is not caused by those single events; or

a single event that the local exchange carrier who is claiming that the interruption of service is due to an emergency situation could have reasonably foreseen and taken precautions to prevent; provided, however, that in no event shall such carrier be required to undertake precautions that are technically infeasible or economically prohibitive.

This Part shall be construed as being content neutral as to whether a strike or other work stoppage is a "wholesale service emergency situation." In the event of a strike or other work stoppage, the local exchange carrier's obligations to provide remedies under this Part shall, in the absence of a decision by a court of competent jurisdiction, be determined by the Commission on a case-by-case basis based upon the individual factual circumstances of each strike or other work stoppage. In making such a determination, and notwithstanding the definition of "wholesale service emergency situation" above, the Commission shall not presume that a strike or other work stoppage is an act of an employee or of the local exchange carrier. Notwithstanding anything to the contrary contained herein, a carrier shall not treat a strike or other work stoppage as a wholesale service emergency situation for reporting purposes unless and until a determination is made that such strike or other work stoppage constitutes a wholesale service emergency situation.

h) Section 110: The Articulated Goals of the Regulation

The ALJPO eliminated Section 110. It concluded that the Goals articulated in Section 110 are set forth in the Public Utilities Act and that Section 110 adds nothing to these goals, as it requires nothing, and it contains no substantive language. ~~Therefore, it should be eliminated.~~

The Position of Staff

Staff argues that the goals originally set forth in the Rule should not be eliminated. Staff acknowledges that the general statements in Section 110 add nothing substantial, but, Staff maintains that because the Commission is acting in a quasi-legislative capacity in this rulemaking, it is proper to establish policy in the Rule. (Staff Brief on Exceptions at 9).

The Position of SBC

SBC maintains that the goals in Section 110 should not be converted into formalistic requirements by placing those goals in the Rule. It contends that the goals articulated are "generic platitudes," which unnecessarily invite legal arguments about their meaning and application.

Commission Analysis and Conclusions

Regulations are the articulation of specific, quantifiable standards that reflect what is set out by the General Assembly in the form of a statute. Here, the statute implemented only provided that:

> The Commission shall establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules.

(220 ILCS 5/13-712(g)). In a rulemaking proceeding, an administrative agency cannot exceed or alter the power conferred on it by statute. (*Eastman Kodak Co. v. Fair Employment Practices Comm.,* 86 Ill. 2d 60, 70, 426 N.E.2d 877 (1981)). The goals and policies articulated in Section 110 are very broad. These broad statements in Section 110 could be construed as exceeding the authority vested in the Commission. Hence, as SBC points out, keeping the goals in the Rule, which add nothing of substance, can only create the climate for litigation. (*See, e.g., Wesko Platting v. Ill. Dept of Revenue,* 222 Ill. App. 3d 422, 426, 584 N.E.2d 162 (1991)). We decline to include Section 110, in the Rule as doing so only opens the door for unnecessary litigation.

i) Section 900: (Renumbered as Section 905) Notice of Termination

Background

Section 905 requires that written notice must be given by a provisioning carrier to the requesting carrier and to the Commission, no less than 35 days prior to termination, discontinuance or abandonment of a wholesale service.

The Position of Staff

Staff contends that Section 905 was designed to provide a clear minimum notice requirement before wholesale service is terminated so that: (i) the requesting carrier and the provisioning carrier will have a prescribed amount of time to resolve the issue(s) causing termination; or (ii) if such issue(s) cannot be resolved, to allow sufficient time for the requesting carrier to notify its end user customers who will lose service as a result of the termination of the wholesale service. Staff argues that Section 905 does not address credit and collection issues; instead, it addresses disconnection of wholesale services for any reason. (Staff Reply Brief at 17).

Staff points out that in the wholesale context, the end user customer is a completely innocent third party, which is entirely different from the situation involved in the retail context. (Staff Ex. 6.0 at 2-3; Reply Brief at 17). Staff posits that although wholesale service quality is often thought of in terms of the relative level of service provided, service quality necessarily includes those situations in which service does not exist for whatever reason.

Therefore, the manner in which and the procedures by which service is terminated should ~~is~~ also be subject to service quality standards.

Staff maintains that 35 days notice allows at least five days for the requesting carrier to provide 30 days notice to its customers, when such notice is required pursuant to Section 13-406 of the Act. Staff also points out that, if there is any basis to stay or suspend the proposed termination or to pursue legal relief, 35 days will provide time for the requesting carrier to seek any relief before a court or the Commission. (Staff Ex. 6.0 at 4; Appendix, Sec. 905).

The ALJPO added language to the proposed Rule that allowed the parties to determine how long the period of time for notice of termination should be. That language, essentially, made Section 905 a default provision, as it became applicable only when the parties did not agree in writing, to a specific period of time. On Exceptions, Staff objects to the inclusion in Section 905 of language that allows the parties to determine the notice period. Staff argues that there is a strong likelihood that requesting carriers will not fully appreciate the significance of a shorter notice period. According to Staff, the language that allows the parties to determine the time period creates the possibility that requesting carriers would unwittingly allow themselves to be placed in an untenable situation. (Staff Brief on Exceptions at 10-11).

The Position of Focal

Focal strongly supports Staff's proposal; it only recommends one change, that is, 40 days notice, rather than 35 days notice. Focal views Staff's proposed 35-day period as not enough time to protect the consumer, and also to allow a purchasing carrier to seek legal redress, if need be, and make alternative arrangements to serve end user customers. Also, purchasing carriers need time to provide end user customers the five days notice that is required by Part 735. (Focal Initial Brief at 2-3).

Focal points out that interruptions or terminations of wholesale service do not merely affect the purchasing carrier; they also result in end user customers losing their service. Thus, Section 905 helps ensure that end users do not suffer any unexpected and abrupt loss of telephone service brought about by a situation in which the end users did not participate—a dispute between two carriers. (Focal Initial Brief at 1-2). In the past, Focal has experienced billing disputes with wholesale carriers and, if services had been terminated, numerous Focal customers would have lost their telephone service. (*See,* Focal Ex. 1.0 at 4-5).

Focal argues that wholesale service can be terminated for a variety of reasons, only some of which, include non-payment by the purchasing carrier. Focal posits that time is needed for the purchasing carrier to explore its legal options and to explore alternative ways to provide service to customers. (Focal Reply Brief at 3).

The Position of Allegiance

Allegiance supports including Section 905 in the Rule. It points out that the Rule does not prevent a wholesale provider from negotiating deposit and credit terms to protect its interests. It avers that nothing could be a more significant component of wholesale service than the notice a wholesale provider must give before terminating service. (Allegiance Reply Brief at 19).

The Position of SBC

SBC opposes including Section 905 in the Rule. SBC views this provision as beyond the scope of this docket, which concerns wholesale service quality. It posits that Section 905 relates to credit and collection issues, which, normally are in rules that are different from service quality rules. (SBC Initial Brief at 4, 22). SBC also views this issue as one concerning whether purchasing carriers have the financial resources to pay their bills and whether they intend to pay them, thus, it concludes that Section 905 exposes provisioning carriers to bad debt. (SBC Ex. 1.10 at 4).

SBC contends that it already provides sufficient notice. Currently, SBC's notice rule is that it may not send a notice of disconnection until at least 15 days after a bill's due date, and that notice must provide for at least 10 business days before service is discontinued, but, in no case can service be discontinued prior to 31 days after the bill is due. Also, service cannot be discontinued when the carrier raises a bona fide dispute concerning a bill incurred during that time period. (SBC Initial Brief at 22, 23).

SBC further posits that Section 905 is not sound policy because it interferes with the ability of carriers to negotiate their own terms. It reasons that sophisticated carriers are fully able to understand, negotiate and agree upon discontinuance terms; they do not need the same Commission intervention or pre-set rules that retail end users might need. (*Id.* at 24-25).

<u>On Exceptions, SBC argues that the Rule should be modified to exclude situations in which a tariff specifies the time period in which disconnection may occur. (SBC Brief on Exceptions at 36-38).</u>

Commission Analysis and Conclusions

We disagree with SBC that the notice requirement in Section 905 relates to credit, billing and collection issues. By its terms, Section 905 applies to any situation where a provisioning carrier is terminating wholesale service to a requesting carrier for any reason. (Appendix, Sec. 905). Therefore, any termination, irrespective of the reason, is covered by the Section 905 of the Rule. As Staff and Focal point out, termination can occur for many reasons, several of which, have nothing to do with a billing dispute. And, as Allegiance points out, wholesale providers can negotiate sufficient credit, deposit and like terms to protect their interests.

However, there may be situations in which 35 days is too much time.~~ for a to adequately protect the provisioning carrier~~. Such situations are best known to individuals purchasing and selling wholesale service, and should be addressed by the individual carriers, when possible.

That does not mean that The Position of Staff, <u>or</u> ~~and~~ that of Focal, is invalid. Both parties established that there have been, and will be, situations in the future, in which, requesting carriers will need some time to protect their customers from termination of service. The reality is that wholesale customers are dependent upon the carriers from which they purchase services, and, as a result, the potential is there for the end user consumers to suffer as a result. We therefore are of the opinion that Section 905 should be a "default provision," one that is in effect when nothing else has been agreed to by the carriers. In this way, Focal's concerns that 35 days is insufficient is also addressed. We therefore amend Section 905 to provide, in pertinent part, as follows:

> <u>Except where otherwise agreed to, in writing, by the carriers,</u> [n]o provisioning carrier offering or providing wholesale service to a requesting carrier shall terminate, discontinue or abandon such service once initiated except upon at least 35 days prior written notice (the "termination notice") to the Commission and the requesting carrier. . .

(Appendix, Sec. 905).

<u>Staff's contention that carriers may not fully appreciate the significance of a shorter notice period and therefore unwittingly agree to a short period of time is not supported by the record. There is no indication that personnel at carriers are unaware of the pertinent laws, or are unaware of what impact those laws have on them. Moreover, the impact termination of service has on a requesting carrier is evident.</u>

<u>We also decline to amend the Rule to provide an exception for those situations in which the time period in question is set forth in a tariff. As is discussed in Section II(e) herein, allowing a tariff to govern the situation here could be construed as replacing the interconnection agreement process with a tariff, which has been held to conflict with TA96. (*See, e.g., Verizon North v. Strand,* 309 F.3d 935, 940-41 (6th Cir. 2002)).</u>

II. Issues Applicable to Level 1 Carriers

a) Sections 200, 220 and 230: (Renumbered as Sections 205, 220 and 230) Level 1 Carriers and Wholesale Service Quality Plans

Background

Level 1 carriers have Wholesale Service Quality Plans that were developed as a result of merger commitments. Level 1 carriers must file their Wholesale Service Quality

Plans on June 1, 2004, and periodically ~~every 2 years~~ thereafter for Commission review. (Appendix, Sec. 205(a)). Carriers can submit preexisting Wholesale Service Quality Plans. ~~Carriers with preexisting plans must submit use those plans from the effective date of the Rule through the effective date of the tariff.~~ (Appendix, Sec. 230(b)).

The Position of SBC

On Exceptions, SBC has conceded that its arguments concerning the 01-0120 Plan became moot after this Commission approved Wholesale Service Quality Plan in docket 01-0662 (the "271 Order").[2]

On Exceptions, SBC points out that this Commission has entered a final Order in docket 01-0662, which approved SBC's Section 271 Wholesale Service Quality Plan. SBC argues that there is no need to establish rules requiring Level 1 carriers to file a Plan, or to establish procedures for reviewing Level 1 Plans, because all the Rule needs to do now is accommodate SBC's Section 271 Plan. SBC further avers that, because the 271 Plan specifies the timing for further Commission review of its Wholesale Service Quality Plan, there is no need to specify a time for Commission review of Plans in the Rule. Also, according to SBC, the two-year period in the Rule for Commission review of Plans conflicts with the three-year period in its 271 Plan. (SBC Brief on Exceptions at 4-8).

SBC argues that the Rule improperly distinguishes, or creates categories, among carriers, as it requires ILECs, or Level 1 carriers, to use their pre-existing Plans, while ~~Such a classification, it reasons, is disparate treatment, as~~ carriers other than Level 1 carriers are not required to have Wholesale Service Quality Plans. (SBC Reply Brief at 5).

SBC proposes a procedure by which a Level 1 carrier can agree to implement a Wholesale Service Quality Plan that meets or exceeds the measurements, standards or remedies provided by the Rule. Such a carrier can petition the Commission for a waiver of ~~the application of~~ part of, or all of, the Rule during the period of time that the alternative plan is in effect. (SBC Initial Brief, Appendix, Sec. 430).

~~The Wholesale Service Quality Plan that resulted from Condition 30 required SBC to make payments, as opposed to credits on a carrier's account, for substandard service. SBC argues that requiring it to make these payments without notice and an opportunity to be heard violates its right to due process. SBC reasons that Section 13-712(e) authorizes the Commission to establish automatic remedies in the form of credits against the related services, and, according to SBC, this statute distinguishes those credits from penalties assessed under Section 13-305. (SBC Initial Brief at 10-11). Citing Section 13-304(a) of the Act, SBC contends that "additional assessments—in particular penalties" require case-specific proceedings with the protections of notice and an opportunity to be heard. SBC~~

[2] Since all of the arguments and conclusions regarding the 01-0120 Plan are now moot, they appear in this document with a strike-through.

~~also cites Section 13-515(j) and maintains that the statute allows the Commission to impose sanctions upon a party that has improperly brought a complaint pursuant to that Section only "after notice and a reasonable opportunity to respond." SBC additionally cites Section 13-516(c), which provides for "enforcement remedies" and allows the Commission to impose remedies or award damages and directs the Commission to establish, by rule, procedures for the imposition of remedies.~~

~~SBC further contends that being required to abide by the Condition 30 Plan is inconsistent with Section 13-712(g), as the statute calls for the Commission to establish remedies to ensure enforcement of its carrier to carrier wholesale service quality rules, and the Condition 30 Plan requires payments to the State of Illinois in some instances. SBC opines that payments to the State do not remedy any harm suffered by a wholesale customer, as they are merely penalties, assessed without notice or a hearing, in violation of Section 13-304 of the Act.~~

~~Essentially, SBC objects to Section 230(b), which requires carriers with preexisting Wholesale Service Quality Plans to be in effect through April 1, 2004. It contends that the structure of payments under its preexisting Plan, the Plan that was ordered as a result of Condition 30 of the SBC/SBC merger and was modified by the Commission in docket 01-0120, (the "Condition 30 Plan") is inconsistent with the structure set forth in Section 13-712 of the Act. SBC contends that the Rule attempts to improperly "resurrect" expired standards from that Plan that are not justified for wholesale services, as the pre-existing Plan, expired on October 8, 2002, pursuant to the terms of the SBC/SBC merger order. (SBC Initial Brief at 10; Reply Brief at 1-2).~~

The Position of Staff

Staff contends that the General Assembly bestowed a broad grant of authority on the Commission to promulgate rules as the Commission sees fit, as Section 712(g), the enabling statute, provides:

> The Commission shall establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules.

(220 ILCS 5/13-712(g)). Staff notes that the statute gave the Commission no specific direction, other than to establish and implement carrier to carrier wholesale service quality rules and establish remedies. Thus, Staff reasons, the General Assembly did not limit the Commission's ability, when promulgating the Rule, to consider particular services, company size, level of competition, and other related factors. Staff argues that it does not follow from the language of Section 13-712(g) that all carriers must be treated exactly the same.

Staff avers that SBC's reliance on the retail service quality provisions and requirements of Section 13-712 to support a "one size fits all" approach for wholesale service quality rules is misplaced, as Paragraphs (c) through (f) of Section 13-712 set forth service quality requirements for retail service. Staff also cites the legislative history of Section 13-712(g), which provides:

> it is not the intent of the General Assembly for the service quality standards found in Section 13-712 of house Bill 2900 to preempt or supercede the service quality standards already imposed . . . It is the intent of the General Assembly for the service quality standards found in Section 13-712 to supplement or add to those service quality standards . .

(Remarks of Rep. Hamos, 92nd General Assembly, House of Representatives, 69th Legislative Day, May 31, 2001, at 34-35). Staff contends that, when enacting Section 712(g), the General Assembly intended to facilitate and nurture the competitive telecommunications environment and protect purchasers of wholesale services. Staff avers that the Rule, as written, reflects the General Assembly's concern that telecommunications carriers must be able to purchase wholesale services at an acceptable quality level. Staff also argues that economic or business classifications made by the government must be evaluated with deference; classifications of business must be sustained, if there is any conceivable basis on which to do so. In support, Staff cites *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981).

Staff contends that it is illogical for SBC ~~that~~ to maintain that this Commission should adopt one set of performance rules to apply, without variation, to all carriers. ~~is illogical and unreasonable, as it fails to recognize the~~ Staff reasons that ~~as~~ there are differences among carriers, both in terms of their systems, and in terms of their impact on, and importance to, developing and maintaining a competitive local telecommunications market. Staff points out that SBC currently controls approximately 80 percent of the access lines in Illinois. Also, SBC accounts for virtually all of the wholesale services provisioned in Illinois and it has developed extensive systems, both electronic and manual, to provision wholesale services and monitor its performance in provisioning such services. (*See,* Staff Ex. 7.0 at 12).

Staff posits that the development of "Levels," or "tiers," attempts to balance the needs of the large ILECs ~~on the one hand,~~ with the needs of smaller ILECs and the CLECs~~, on the other~~. Staff cites evidence it presented at the hearing that the multi-level approach was designed to address administrative ease, logical designation, and consideration of purchasing carrier requests.

Staff maintains that for those carriers that do not provide much in the way of wholesale services, the benefit of maintaining and reporting detailed and sophisticated performance measures and disaggregations, which are characteristic of the Level 1 Plans, could be outweighed by the cost of maintaining and reporting such data. For larger carriers with significant wholesale activity, on the other hand, the benefit of maintaining and reporting detailed and sophisticated performance measures and disaggregations can outweigh the related costs. Additionally, the carriers have vast differences regarding automated versus manual OSS systems, as well as different procedures and methods for provisioning wholesale services. Staff concludes that the demand for, and provisioning of, wholesale services in the service territories of smaller carriers is nowhere near the level in SBC's territory, and the systems used to provision those wholesale services are often manual and far less sophisticated than SBC's systems. (Staff Ex. 7.0 at 5-6).

On Exceptions, Staff maintains that the Commission's approval of a Wholesale Service Quality Plan in Docket 01-0662 ("the 271 Plan") does not obviate the need for Level 1 requirements in the Rule. Staff points out that the 271 Plan is not based on state law requirements; instead, SBC agreed to this undertaking in order to obtain a positive recommendation from this Commission to the FCC regarding 271 approval. (Staff Reply Brief on Exceptions at 3).

Staff posits that the Rule and any Wholesale Service Quality Plans filed pursuant to the Rule will be based on Illinois law. The Level 1 requirements in the Rule give the Commission the authority to implement, modify or continue a Plan beyond the duration of SBC's 271 Plan. According to Staff, certain events could take place, in the future, that could nullify SBC's 271 Plan. For example, SBC could abandon its request for FCC approval. Then, according to Staff, the 271 Plan would no longer bind SBC to the terms of the Plan. On the other hand, the Level 1 requirements in the Rule provide a continuing state law basis for the Commission to adopt, approve and modify Wholesale Service Quality Plans. (*Id.* at 3-4).

Staff avers that the Rule was designed to account for existing Wholesale Service Quality Plans. Thus, SBC's preexisting 271 Plan would be its Wholesale Service Quality Plan, pending the filing due date. Staff is of the opinion that, at that point in time, there would be no need or desire to re-litigate issues that were addressed in the 271 Plan. (*Id*).

The two-year review pursuant to the Rule is in June, 2006, which coincides with the timing of the review scheduled in the 271 Plan, which is approximately May, 2006. Thus, according to Staff, there is no inconsistency between the Rule and the 271 Order.

Staff opines that certain language in the Rule could be construed to require SBC to use the 01-0120 Remedy Plan as its "preexisting plan." Staff recommends modifying that language.

~~Staff argues that SBC has confused the issue by failing to explain how the Rule actually uses and relies upon a preexisting Plan, and then further obfuscates this issue by misstating its position. Staff avers that the Rule recognizes that there are carriers with preexisting Plans, those Plans can come into play as a starting point, but the Rule, in fact, does not extend the term of the Condition 30/01-0120 Wholesale Service Quality Plan. (Staff Reply Brief at 4-6).~~

The Position of Allegiance

Allegiance argues that the Commission has promulgated rules on numerous occasions that categorize utilities by size or other distinguishing characteristic. Allegiance reasons that therefore, it is an established practice at the Commission to divide utilities or carriers into categories and implement different requirements for each category. Pursuant to the rules of statutory construction, it maintains, the General Assembly must be presumed to know that such categorization could take place, as it must be presumed that the General Assembly was aware of other Commission regulations that created classifications. (Allegiance Reply Brief at 11-12).

The Position of McLeod

According to McLeod, the adoption of the 271 Plan does not really present a change in circumstance. At various time prior to adoption of the 271 Plan, SBC was subject to the Plan that emerged from 01-0120 or, the Plan that arose from the SBC/Ameritech merger, in docket 98-0555. McLeod argues, essentially, that the existence of the 271 Plan should not exempt SBC from regulation. (McLeod Reply Brief on Exception at 2).

The Position of AT&T

AT&T points to other parts of the 2001 Amendments (H.B. 2900, of which, Section 712(g) was a part). AT&T contends that those statutes, ~~amendments~~, specifically, Sections 13-202.5 and 13-801, effectively "single out" ILECs. Thus, AT&T reasons that the Act recognizes the obvious policy reasons for treating smaller companies differently from larger ILECs. AT&T also concludes that, if the Commission were to treat large ILECs like SBC in the same manner as the CLECs, the ILECs would have no incentive to improve their service quality.

~~AT&T further contends that Section 712(g) does not mention hearings, and, according to AT&T, the whole purpose of having a Wholesale Service Quality Plan is to avoid having a hearing each time an ILEC fails to provide adequate service to a CLEC. (AT&T Reply Brief at 2-4, 8).~~

~~AT&T further objects to SBC's proposal to use "voluntary plans." AT&T argues that SBC's proposal has no process for determining how voluntary plans should be used; it does not provide for what kind of factual material should be submitted and it lacks any kind of process for notifying interested parties that an ILEC is seeking adoption of a voluntary plan. (AT&T Reply Brief at 9-10).~~

The Position of WorldCom

WorldCom avers that often, Commission Rules differentiate between carriers, based on various criteria. Also, TA96 (47 U.S.C. Sec. 251 *et seq.)* differentiates between the carriers based on whether they are ILECS or CLECs. WorldCom posits that there is no language in Section 13-712(g) that suggests or requires the kind of "one size fits all" approach suggested by SBC. (WorldCom Reply Brief at 21).

WorldCom also seeks to modify the definition of the term "Preexisting Plan" in Section 105 of the Rule. WorldCom maintains that the current definition could be interpreted to include the perfunctory Commission approval of negotiated or arbitrated agreements that is required pursuant to TA96. WorldCom reasons that "approval" pursuant to TA96 should not be deemed to be "Commission approval" within the meaning of the Rule. WorldCom suggests that the definition in Section 105 of "preexisting plan" should be amended as follows:

'Preexisting Plan' means:

a) A plan implemented by or for a Carrier prior to the effective date of this rule (but not necessarily effective on such date) that contains one or more of the components required for a Wholesale Service Quality Plan as set forth in Section 731.300 (now Section 731.305) ("Pre-Rule Plan"), the terms and provisions of which have been specifically reviewed and approved by the Commission within the previous three (3) years, in a docketed proceeding other than a proceeding that reviewed a negotiated or arbitrated agreement pursuant to Section 252 of the Telecommunications Act of 1996, ~~(the scope of which was limited to review and approval of a Pre-Rule Plan)~~; or

b) If the terms and conditions of a Pre-Rule Plan have not been specifically reviewed and approved by the Commission within the previous three (3) years in a docketed proceeding, other than a proceeding that reviewed a negotiated or arbitrated agreement pursuant to Section 252 of the Telecommunications Act of 1996, (the scope of which was limited to review and approval of a Pre-Rule Plan) for such Carrier, then the most recent Pre-Rule Plan implemented by such Carrier pursuant to a Commission order or, if no Pre-Rule Plan was implemented by such Carrier pursuant to a Commission order, the most recent Pre-Rule Plan implemented by such Carrier on a voluntary basis.

(WorldCom Reply Brief at 11-12; 47 U.S.C. Sec. 252(e)).

The Position of AT&T/WorldCom[3]

[3] AT&T and WorldCom filed a joint Reply Brief on Exceptions.

On Exceptions, AT&T/WorldCom urge the Commission to reject SBC's contention that it should not be subject to Level 1 requirements. According to AT&T/WorldCom, this proposal ignores the differences between large carriers, such as SBC, and smaller ILECs, as well as CLECs. These parties argue that the courts have held that what is contained in a state public utility commission's order giving 271 approval is merely a non-binding recommendation. AT&T/WorldCom point out that SBC's 271 Plan was never addressed in this docket. (AT&T/WorldCom Reply Brief on Exceptions at 5-7).

The Position of the Wireless Coalition

In its Brief on Exceptions, the Wireless Coalition contends that the Commission should require Level 1 carriers to file their Plans on or before January 2, 2004. (Wireless Brief on Exceptions at 17, 18).

Commission Analysis and Conclusions

Whether Wholesale Service Quality Plans Should be Filed with the Commission

As SBC concedes, because we have already approved a new Plan for SBC in docket 01-0662, SBC's concerns about the continuation of the 01-0120 Plan are now moot.

We do not agree with SBC that existence of the 271 Plan obviates the need for rules regarding Level 1 carriers. SBC is not the only Level 1 carrier in Illinois. Yet, the 271 Plan only concerns SBC. Moreover, while SBC contends that it should not be subject to Commission scrutiny of the 271 Plan in June of 2004, as Staff points out, there is no reason to believe that such scrutiny would be protracted or that it would result in litigation of the issues addressed in that Plan.

However, as SBC points out, the two-year review period in the Rule conflicts with the three-year review period provided in SBC's 271 Plan. And, while Staff indicates that there will be no immediate conflict between the two review periods, there should be some language in the Rule harmonizing the two different review periods.

Additionally, the fact that the 271 Plan has three-year review periods is some indicia that the two-year periods in the Rule are too frequent. Scheduling less frequent reviews encourages parties to "work out their differences" through mechanisms in Plans like the informal six-month review process in SBC's Plan. Also, Commission review of a Plan can be time-consuming and costly. We also note that the Rule requires submission of a Plan, ~~with supporting tariff~~, on or before June 1, 2004, and use of a Level 1 carrier's pre-exisiting Plan between the effective date of the Rule and June 1, 2004. Section 205(a) will be amended to provide that:

> On or before June 1, 2004, and every three ~~two~~ years thereafter, every Level 1 carrier shall file with the Commission for review and approval . . . its wholesale service quality plan . . .

Section 230(b) shall likewise be amended to provide:

> For a carrier with a Preexisting Plan, its Preexisting Plan shall be its effective Wholesale Service Quality Plan . . . due to be filed on or before June 1, 2004, under Section 731.200. The provisions of this paragraph shall apply notwithstanding any provision, term or condition of the Preexisting Plan, or any related Commission order, providing for the termination or expiration of such plan due to or based on the passage of time.

In this way, once SBC meets the June 1, 2004, deadline date, its filing dates will be once every three years.

We also note that, as WorldCom points out, the Rule could be construed to equate Commission approval of a Wholesale Service Quality Plan with the limited approval that is required of negotiated or arbitrated agreements pursuant to TA96. Statutorily, such review is limited to consideration of the following (i) whether the agreement discriminates against a telecommunications carrier that is not a party to the agreement; or (ii) whether implementation of the agreement or a portion of the agreement is not consistent with the public interest, convenience and necessity; or (iii) arbitrated agreements must meet the requisites of Section 251 of the Act. (47 U.S.C. Sec. 252(e)). Such approval cannot be equated with Commission review of the merits of a Wholesale Service Quality Plan. WorldCom's proposed language, which excludes the limited approval pursuant to TA96, will be incorporated into Section 105 of the Rule. (Appendix, Sec. 105).

We also agree with Staff that certain portions of the definition of "Preexisting Plan" could be construed as requiring SBC to use the Plan that developed in 01-0120. That definition should be amended to read:

> 'Preexisting Plan' means:
>
> > A plan implemented by or for a carrier prior to the effective date of this rule ~~(but not necessarily effective on such date)~~ that contains one or more of the components required for a wholesale service quality plan as set forth in Section 731.305 ("pre-rule plan"), the terms and provisions of which have been specifically reviewed and approved by the Commission within the previous three (3) years, in a docketed proceeding other than a proceeding that reviewed a negotiated or arbitrated agreement pursuant to Section 252 of the Telecommunications Act of 1996, 47 U.S.C. Sec. 252~~(the scope of which was limited to review and approval of a Pre-Rule Plan)~~; or

> If the terms and conditions of a Pre-Rule Plan have not been specifically reviewed and approved by the Commission within the previous three years in a docketed proceeding other than a proceeding that reviewed a negotiated or arbitrated agreement pursuant to Section 252 of the federal Telecommunications Act of 1996, then the most recent Pre-Rule Plan implemented by that carrier pursuant to a Commission order or, if no Pre-Rule Plan was implemented by that carrier pursuant to a Commission order, the most recent Pre-Rule Plan implemented by that carrier on a voluntary basis.

With regard to SBC's suggested waiver provision, the Rule already provides for a waiver of filing requirements for Level 1 carriers; we see no need to expand the Rule in this regard. Furthermore, SBC's waiver provision, as written, could be used to circumvent Level 1 requirements.

Finally, we do not agree with the Wireless Coalition's argument that Level 1 carriers should be required to file their Plans in January of 2004. These carriers may need time to prepare for the filing.

~~In this way, SBC is free to submit its Wholesale Service Quality Plan for Commission review when it sees fit, as long as it is not later than April 1, 2004. Thus, the Rule can no longer be said to impose any pre-existing Wholesale Service Quality Plan on a Level 1 carrier until such time as it makes its initial April 1, 2004 filing.~~

~~SBC argues that it should not be subject to "penalties," contained in its Condition 30 Wholesale Service Quality Plan, without notice and an opportunity to be heard. It cites many provisions of the Act, none of which, concern wholesale service. As Staff points out, the provisions in Section 712 cited by SBC concern retail service, which has nothing to do with the issues here. (220 ILCS 5/13-712).~~

~~Also, notice and an opportunity to be heard are required before some sort of deprivation of a right can occur, such as deprivation of a property right, or prior to threatening a privacy interest. (*See, e.g., Pavlakos v. Department of Labor,* 111 Ill. 2d 257, 264, 489 N.E.2d 1325 (1985); *Lopez v. Fitzgerald,* 76 Ill. 2d 107, 122, 390 N.E.2d 835 (1979)). SBC makes no attempt to explain what right it has that would be affected by the imposition of "penalties." Nor is it obvious, since, without the Condition 30 Plan, SBC would still be required to provide monetary compensation to CLECs in the form of credits. It is notable that, although notice and an opportunity to be heard are well-established constitutional requirements, SBC does not cite one case embodying these constitutional concepts.~~

~~Additionally, also there is nothing in the Rule requiring SBC to "resurrect" the Plan that issued as a result of Condition 30 to the SBC/SBC merger, as modified by the~~

~~Commission in docket 01-0120. Rather, the Rule merely requires SBC to have a Commission-approved Plan~~ ~~that meets this Rule's requirements.~~

~~Pursuant to the terms of the Rule, SBC is free to submit for Commission consideration and approval whatever changes to its pre-existing Plan it sees fit. Therefore, we see no need for SBC's proposed "voluntary plan."~~

Tiers

SBC argues that the Rule improperly creates categories among carriers. Because the requirements for different types of carriers are not the same, SBC maintains that the Rule subjects SBC to disparate treatment. In certain situations, subjecting a person or entity to disparate treatment violates the United States and Illinois Constitutions.

SBC's vague reference to disparate treatment, a well-established constitutional theory, without citing any legal basis in support, lacks merit. The equal protection clauses of the Illinois and United States Constitutions remedy invidious discrimination. Those clauses require the government to treat similarly-situated individuals in the same manner. (*Segers v. Industrial Comm.,* 191 Illl.2d 421, 435, 732 N.E.2d 488 (2000)). The level of scrutiny applied in reviewing a law creating the classification pursuant to the equal protection clause depends on the nature of the classification; those classifications that involve, or create, a classification based on ~~are based on~~ a suspect class, such as race, or affecting a fundamental right, receive a heightened level of review, or, what is called, strict scrutiny.

SBC does not mention a fundamental right; nor is it in a suspect class. Classifications of businesses that do not involve fundamental rights are reviewed under the rational basis test. (*Id)*. Pursuant to the rational basis test, the classification must be upheld, if there is any set of facts that can reasonably be conceived of which justifies the imposition of the classification. (*Stroger v. R.T.A.,* 201 Ill.2d 508, 522, 778 N.E.2d 683 (2002)).

We find no violation of the equal protection clauses of the United States and Illinois Constitutions, and we find Staff's approach, in imposing different requirements on different carriers, to be a factually reasonable basis for the Rule. The record is replete with evidence that the needs of, and support systems of, different carriers is drastically different. Also, the record established that currently, SBC provides most of the wholesale service, while Level 2 carriers and Level 4 carriers provide very little wholesale service, if any. If we were not to recognize those differences, we would be ignoring that evidence. Moreover, as a practical matter, we are obligated to acknowledge the existence of Level 1 Wholesale Service Quality Plans, as, otherwise, the Rule could result in duplication. There is ample evidence in this record demonstrating the need for different classifications for different types of carriers.

We further concur with Staff that the broad grant of authority in Section 712(g), the enabling statute, allows this Commission to create a system that reasonably categorizes ~~reasonable categorization of~~ carriers. Any other reading of this statute would diminish the General Assembly's articulated concern in Section 712(a) which is:

> It is the intent of the General Assembly that every telecommunications carrier meet minimum service quality standards . . . on a non-discriminatory basis to all classes of customers.

Thus, the General Assembly's concern was with establishing minimum service quality standards and Section 712(g) gave the Commission a wide grant of authority to do whatever is necessary to establish those ~~minimum service quality~~ standards, including categorizing carriers based on their size and level of complexity of their equipment.

As Allegiance points out, we are required by the rules of statutory construction to presume that, when enacting Section 712(g), the General Assembly was aware that the Commission often created classifications between carriers, based on size and like criteria, as this Commission has often done so in the past. (S*ee, e.g., Jacobson v. General Finance,* 227 Ill. App. 3d 1089, 1098, 592 N.E.2d 1121 (2nd Dist. 1992)). Therefore, the General Assembly must be presumed to know that the Rule promulgated could classify carriers and it nevertheless gave the Commission wide, unrestricted authority. We conclude that classifying carriers based on the criteria set forth in the Rule is within the scope of authority the General Assembly conferred upon the Commission in Section 712(g). ~~vest that the Rule's Levels, or Tiers, which create classifications of carriers based on certain criteria, do not exceed the scope of Section 712(g), the enabling statute.~~ Nor does the system of classification in the Rule ~~it~~ violate any other provision in Section 712.

b) SBC's Proposal to Delete Sections 220(b)(3)

The Position of SBC

Section 220 requires that certain documentation must be provided by the Level 1 carriers in support of their ~~biennial~~ filings that support Wholesale Service Quality Plans. SBC seeks to delete Subsection 220(b)(3), which requires Level 1 carriers to file evidence with the Commission supporting their Wholesale Service Quality Plans establishing the extent to which that Plan has successfully facilitated a competitive telecommunications market. SBC maintains that this provision unreasonably forces Level 1 carriers to speculate about CLEC business decisions and the impact of a Wholesale Service Quality Plan on the marketplace. (SBC Initial Brief at 31).

The Position of Staff

Staff maintains that Section 220(b)(3) is simply an informational requirement that seeks a Level 1 carrier's assessment of its Wholesale Service Quality Plan on the competitive market. (Staff Reply Brief at 20).

Commission Analysis and Conclusions

We agree with SBC that Level 1 carriers should not be forced to make a determination as to whether or how their Wholesale Service Quality Plans facilitate competition in the marketplace, as such evidence could only be speculative, at best. While Staff contends that this requirement is an informational one, Staff acknowledges that it requires an ILEC to make an assessment. It is not, therefore, a simple request for information and it appears that the assessment it requires an ILEC to make would be of little evidentiary value. Section 220(b)(3) will be deleted, in its entirety, and Sections 220(b)(4) through (8) shall be renumbered. (Appendix, Sec. 220(b)).

c) SBC's Proposal to Amend the Reporting Requirements in Sections 320 and 410 (Renumbered as 325(a) and 410)

The Position of SBC

SBC contends that the reporting requirements for Level 1 carriers in Sections 325 and 410 should be clarified to ensure that the information reported does not include competitive information about wholesale services or about other competitors, and is limited to data concerning the purchasing carrier's own transactions and remedies. (SBC Initial Brief at 31).

The Position of Staff

Staff finds SBC's concerns to be reasonable with regard to Section 325, and it has proposed the following modification:

> Each carrier's wholesale service quality plan shall provide that the Level 1 carrier will report monthly data to the Commission and to <u>each</u> carrier purchasing wholesale services. At a minimum, the monthly data shall include the total number of transactions on a per measure basis, the number of instances in which standards contained in the Level 1 carrier's wholesale service quality plan were not met on a per measure basis, and calculations supporting any remedies <u>paid pursuant to the Wholesale Service Quality Plan. Although aggregate data must be made available to the Commission and all carriers purchasing Wholesale Services, carrier specific data should only be made available to the Commission and carriers for their own (i.e., the purchasing carrier's) business transactions</u>.

Staff states that it does not agree that a change to Section 410 is required. (Staff Reply Brief at 21).

Commission Analysis and Conclusions

It appears that Staff's revision to Section 325 addresses SBC's concerns. Staff's changes to this portion of the Rule are adopted. (Appendix, Sec. 325).

With regard to Section 410, that Section does not mention competitive information about wholesale services or about other competitors. At most, it only requires that aggregate data (total amounts) must be made available to Commission Staff and purchasing carriers. (*See,* Appendix, Sec. 410(b)). Aggregate data is not specific enough to reveal competitive information. We therefore decline to amend Section 410.

d) Sections 300(g) and 325 (Renumbered as Sections 305(g) and 330): Audits of Level 1 Carriers

Background

The Rule requires Level 1 carriers to provide, in their Wholesale Service Quality Plans, for periodic audits of the wholesale performance data conducted by an independent auditor. (*See,* Appendix, Sec. 330). Such audits must be scheduled at regular intervals; these audits are required in order to ensure that the data reported is valid, reliable and in accordance with the published business rules. (*Id.* at Sec. 305(g)). The Rule also requires that such Plans must ~~to~~ provide for audits initiated by requesting carriers. (Appendix, Sec. 330).

The Position of Verizon

Verizon views Section 330 as unnecessary because, according to Verizon, the information audited is easily calculated and verified by the affected CLEC. Verizon concludes that a more reasonable alternative is for the Commission to adopt an audit provision whereby audits are only performed if requested by a purchasing carrier. (Verizon Initial Brief at 27). Because Verizon's proposal would require the purchasing carrier to pay for the audit if the purchasing carrier's concern is not substantiated by the audit, Verizon concludes that its approach discourages frivolous audit requests. (Verizon Initial Brief at 26-28).

Currently, Verizon is required to submit audits to the FCC. In the alternative, Verizon proposes that, if the Commission deems regular audits to be necessary, the results of FCC plan audits should ~~to~~ satisfy the regularly-scheduled audit requirement. Verizon notes that the same measures, standards and incentive calculations are involved in the FCC audits, and therefore the audit of the FCC plan would cover the same systems, data collection and incentive calculation methods. (*Id.* at 28).

The Position of SBC

SBC has proposed additional language for Section 325 to clarify that a carrier requesting an audit should pay the cost of an audit, unless the basis for requesting the audit is found to be warranted, and then, the costs would shift to the audited carrier. SBC reasons that if a requesting carrier did not at least potentially bear some responsibility for the cost of the audit, that carrier would have no incentive to limit its audit requests to those that are truly warranted. (SBC Initial Brief at 31-32).

The Position of Staff

Staff contends that the issues set forth by SBC and Verizon are best addressed in their Wholesale Service Quality Plans. (Staff Reply Brief at 21).

Commission Analysis and Conclusions

We disagree with Verizon that the information audited is easily calculated and verified by the affected CLEC. Audits concern more than the amounts paid, they verify the bases for the amounts paid. (*See,* Appendix, Secs. 305(g) and 330).

However, Verizon's point, essentially, that it already is required to submit audits to the FCC, is well-taken. There is no evidence indicating that the results of this same audit would be less credible, or, that they would be in different measures, and therefore less understandable. We also note that audits can be time-consuming and expensive. However, there is nothing in the Rule that would prevent Verizon from submitting the same audit to the Commission that it submits to the FCC. The only limitation in those provisions is that the audit must be conducted by an independent auditor. Therefore, we deem any change to the Rule to regarding regularly-scheduled audits to be unnecessary.

Regarding audits initiated by requesting carriers, as Staff points out, Verizon and SBC are free to specify who pays for such audit in their Wholesale Service Quality Plans. (*Appendix,* Sec. 330). Therefore, the changes proposed by Verizon and SBC are unnecessary.

e) Sections 200 and 210 (Renumbered as Section 205 and 210): Tariffing of Level 1 Plans

Background

The Rule~~s~~ requires Level 1 carriers to submit a Wholesale Service Quality Plan and a tariff containing its Wholesale Service Quality Plan for Commission approval every three ~~two~~ years, or, upon on a change in the Plan. Such a filing must include supporting documentation. (Appendix, Secs. 220(a) and (b)). However, Level 1 carriers may seek, and obtain, waivers of parts of the supporting documentation requirement, if good cause is shown. (*Id.* at Sec. 200(c)).

The Position of Staff

Staff proposes that the Rule must require Level 1 carriers to tariff their Wholesale Service Quality Plans. *(See* Appendix, Secs. 200, 210). In support, Staff cites Section 13-501(a) of the Act, which provides, in relevant part, as follows: "No telecommunications carrier shall offer or provide telecommunications service unless and until a tariff is filed with the Commission which describes the nature of the service, applicable rules, and other charges, terms and conditions of service . . ." (220 ILCS 5/13-501(a)). Staff reasons that a Wholesale Service Quality Plan fits within the statutory definition of "telecommunications service," which is "[t]the provision or offering for rent, sale or lease, or in exchange for other value received, of the transmittal of information. . . and includes access and interconnection arrangements and services." (220 ILCS 5/13-203).

Staff maintains that what is contained in a Wholesale Service Quality Plan is "access and interconnection arrangements and services." Staff further cites the Act's definition of the term "rate," which includes "every individual or joint rate, fare, toll, charge, rental or other compensation of any public utility . . . or any schedule or tariff thereof, and any rule, regulation, charge, practice or contract relating thereto."' (220 ILCS 5/3-116). It argues that a Wholesale Service Quality Plan fits within this definition. Staff concludes that the Act requires tariffing of the services provided in a Wholesale Service Quality Plan.

According to Staff, tariffs do more than govern the rates and charges a carrier may assess ~~to their customers~~ for services provided; tariffs must also contain rules, regulations, storage or other charges, privileges and terms and conditions relating to the provisioning of services. Staff additionally cites Section 9-104 of the Act, which requires tariffing of any service, product or commodity to include the relevant rates and other charges and classifications, rules and regulations. Staff further avers that the specific components of the physical provisioning of telecommunications services, and the quality of that services, which are contained in a Wholesale Service Quality Plan, are the manners in which, and level at which, a given service must be provided, which are routinely the subject-matters of tariffs. (Staff Reply Brief at 26).

Staff opines that Wholesale Service Quality Plans should be tariffed for policy reasons, as tariffs are public documents that are generally available to consumers, as well as all other carriers. Staff concludes that having the Wholesale Service Quality Plans tariffed assures that changes cannot be made to the Plans without Commission oversight, thereby allowing comments and input from connecting carriers. (Staff Exhibit 3.0 at 6).

Staff is of the opinion that if Wholesale Service Quality Plans were to be provided to the Manager of the Telecommunications Division, as Verizon suggests, there would be no means, by which, interested parties could comment on proposed changes. Staff is of the opinion that Verizon's alternative provision does not have a procedure in place for notifying interested parties when a document is submitted at Staff level.

Staff strongly disagrees with Verizon's contention that tariffing a Plan renders it less flexible. Staff posits that tariffs can be, and are, changed at will, subject to the Commission's authority to suspend and investigate a tariff. There is no limitation to the amount or scope of changes that can be made to any tariff. Any changes in the marketplace, Staff concludes, can be addressed easily in the tariffs.

Also, according to Staff, other carriers may want to "buy services out of the tariffs" rather than through an interconnection agreement. Additionally, Staff maintains that, without tariffing, a Wholesale Service Quality Plan would be subject to revision with each negotiation, which could lead to discriminatory treatment. Staff concludes that although it may be appropriate to incorporate Wholesale Service Quality Plans into interconnection agreements, such action would not satisfy the state law requirement to tariff such a plan.

The Position of Allegiance

Allegiance contends that a Wholesale Service Quality Plan should contain~~s~~ "terms and conditions of the service to be provided" within the meaning of Section 501(a) of the Act, which sets forth the general requisites for tariffing of telecommunications services. (220 ILCS 5/13-501(a)). Allegiance further argues that Verizon has not presented any evidence substantiating its claim that tariffing would be burdensome to it. Allegiance finds it implausible that tariffing Wholesale Service Quality Plans would be burdensome, as carriers file and maintain tariffs all the time. Allegiance points out that SBC tariffs its Wholesale Service Quality Plan. Allegiance acknowledges that there may be alternatives to tariffing. However, it finds Verizon's proposal to be unacceptable, as, according to Allegiance, Verizon's proposal does not have established, predictable procedures for periodic review. (Allegiance Reply Brief at 17-8).

The Position of McLeod

McLeod does not disagree with Verizon's averment that there may be a reasonable alternative to tariffing. It finds Verizon's alternative unacceptable because, according to McLeod, a Wholesale Service Quality Plan must be an enforceable, legal obligation of a carrier there must be an established, predictable procedure for periodic review of a Plan, as well as for amendments and revisions to Plans. McLeod seeks to require a Level 1 carrier to file a petition with the Commission every two years. In that petition, the Level 1 carrier would seek an extension of, or, a revision of a Plan. (McLeod Reply Brief on Exceptions at 15).

The Position of Verizon

Verizon argues that there is no legal requirement for Level 1 carriers to tariff their Wholesale Service Quality Plans because, according to Verizon, a Wholesale Service Quality Plan is not a "telecommunications service;" instead, it is a set of standards and a self-executing mechanism for calculating incentive payments when standards are not met. In support, Verizon cites 220 ILCS 5/13-203. Verizon also avers that a Wholesale Service Quality Plan is not offered in exchange for value, within the meaning found in Section 13-203, which defines "telecommunications services." (Verizon Initial Brief at 15).

Staff's argument is fatally flawed, Verizon posits, because a Wholesale Service Quality Plan does not contain a "rate." Verizon points to part of Section 3-116 of the Act, which defines a "rate" as a charge that is compensation of a public utility. According to Verizon, a Wholesale Service Quality Plan cannot be considered to be a charge that compensates a public utility and it does not include a schedule of charges or other rules that would affect the amount a carrier charges a customer for a given service. (Verizon Initial Brief at 16).

Verizon contends that a Rule requiring the tariffing of Level 1 Wholesale Service Quality Plans will result in significant and unjustified burdens on Level 1 carriers, as, according to Verizon, tariffs are not easily amended, and, tariffs can result in a proceeding that lasts approximately 11 months. It points out that its current suggested alternative to tariffing ~~Plan~~ provides for automatic updates to incorporate revisions. (Verizon Ex. 1.0 at 4-6; Verizon Initial Brief at 16-17).

Verizon has offered alternative language to replace Staff's proposed Section 200. This alternative language would allow Level 1 carriers to submit their Wholesale Service Quality Plans to the Commission's Manager of the Telecommunications Division, rather than filing a tariff, every two years, or whenever an amendment is made to the plan. Verizon's proposal also requires Level 1 carriers to notify all certificated carriers in Illinois of any such submissions. Further, the proposal has a process, by which, the Commission may investigate a Level 1 carrier's Plan, if conditions warrant. Verizon posits that it does not matter that a submission to the Manager of the Telecommunications Division is not an official filing, as, if a Level 1 carrier did not make such a submission, the Commission could use its enforcement powers relating to a violation of a Commission Rule, order, or mandate; it could also use the language it provided for the Commission to initiate a proceeding to investigate, modify, update or amend a Wholesale Service Quality Plan. (Verizon Initial Brief at 21-22).

Additionally, the Company notes that its current Wholesale Service Quality Plan was originally submitted to Commission Staff and no party has alleged that Verizon's Plan ~~it~~ is not available to the Commission and interested parties. (*Id.* at 20). According to Verizon, its alternative proposal actually informs interested parties in a manner that is superior to tariffing, as its proposal requires the posting of a Plan on a carrier's website, instead of the current system, which requires a carrier to follow the Commission's daily filings to discover an update to a Level 1 Plan. Verizon concludes that the posting of a plan on a carrier's website is a better method of making a Plan available to consumers and carriers. (*Id.* at 21-22).

Citing *Verizon North v. Strand,* 309 F.3d 935, (6th Cir. 2002), Verizon argues, essentially, that tariffing Wholesale Service Quality Plans circumvents the interconnection process, and thus, any law requiring such tariffing conflicts with, and is therefore preempted by, TA96. (Verizon Brief on Exceptions at 26-27).

The Position of SBC

SBC argues in its Reply Brief that requiring Wholesale Service Quality Plans to be tariffed contravenes TA96, specifically 27 U.S.C. Sec. 252(a)(1). SBC cites *Wisconsin Bell v. Wisconsin Public Service Comm.* (Sept. 27, 2002, No. 01-C-0690), in which, the U.S. District Court for the Western District of Wisconsin ruled that, when requiring Wisconsin Bell to offer network elements in certain combinations pursuant to tariffs, the Wisconsin Public Service Commission (the "WPSC") "imposed a requirement that circumvents the interconnection agreement process prescribed under Sec. 252." (*See,* SBC Reply Brief at 15-16, Appendix to Reply Brief, at 14). The court reasoned that, even though a buyer was not required to "buy out of the tariff," because the ILEC ~~incumbent~~ had no choice in the matter, the WPSC's imposition of a tariff on the ILEC circumvented the requirement in 47 U.S.C. Sec. 251(b)(1) that incumbents and requesting carriers negotiate binding agreements. (*See,* SBC Reply Brief, Appendix, p. 10).

SBC also cites *Verizon North, Inc., v. Coast to Coast Telecommunications,* (Oct. 3, 2002, No. 00-CV-71442) in which, the U.S. District Court for the Eastern District of Michigan ruled that, when requiring Verizon to adhere to a tariff, in the absence of an interconnection agreement, the Michigan Public Service Commission improperly circumvented Section 252 of TA 96, 47 U.S.C. Sec. 252. (*See,* SBC Reply Brief, Appendix, at 9-11).

The Position of AT&T

AT&T posits that tariffing Wholesale Service Quality Plans will provide an excellent reference point to any new CLEC and it allows the Commission to carefully monitor the Plans. (AT&T Reply Brief at 11). AT&T cites *Michigan Bell Telephone Co. v. MCIMetro Access Transmission Co.,* 323 F.3d 348 (6th Cir. 2003), in support of its contention that Level 1 Plans should be tariffed. (AT&T/WorldCom Reply Brief on Exceptions at 12-13).

Commission Analysis and Conclusions

AT&T's Arguments

AT&T contends that the reasoning in *Michigan Bell Telephone Co. v. MCIMetro Access Transmission Co.,* 323 F.3d 348 (6th Cir. 2003), supports its argument that Wholesale Service Quality Plans should be tariffed. In *MCI/Metro,* however, the parties had already negotiated an interconnection agreement. The Court ruled that a decision made by the Michigan Public Service Commission (the "MPSC") allowing MCI/Metro to submit resale orders to an ILEC in a manner that conformed with an ILEC's tariff, but did not conform with the parties' interconnection agreement, did not conflict with TA96. The Court stated that the parties in question had already complied with TA96 by engaging in the negotiation and review process, as they had a pre-existing interconnection agreement. It concluded that employing a different method, allowable under state law, to transmit resale orders, did not eviscerate the agreement. In so ruling, the Court reasoned that: "This case is not one where competing carriers were attempting to bypass the negotiation process that creates interconnection agreements." (*MCI/Metro,* 323 F.3d at 360).

Pursuant to the reasoning in *MCI/Metro,* if a state commission permits tariffing of items that are incidental to the interconnection process, such tariffing does not conflict with TA96. However, the ruling in *MCI/Metro* also made it quite clear that if a state commission requires tariffing in a manner that circumvents the interconnection agreement process, that commission has acted in conflict with, and its action is therefore preempted by, TA96.

The Arguments of SBC

The federal cases cited by SBC make it clear that tariffing cannot be used to replace negotiated interconnection agreements. The reasonableness of this congressional mandate becomes evident when it is viewed in its factual context. A negotiated agreement is a contract, which is negotiated, like any other contract. The negotiation process allows parties to debate their special needs in the negotiation process and it allows those parties to enunciate their needs and concerns through a legally binding obligation—the contract. Thus, when a tariff supplants a negotiated agreement, the use of the tariff has been held to violate 47 U.S.C. Sec. 252(i) and other pertinent portions of TA96.[4] (*See, e.g., Verizon North v. Strand,* 309 F.3d 935 (6th Cir. 2002)). As will be set forth below, we conclude that requiring Wholesale Service Quality Plans to be tariffed supplants the interconnection agreement process. ~~Here, however, a tariff allows, but does not require, a CLEC to "buy out of the tariff" without entering into an interconnection agreement. Such a process does~~

[4] 47 U.S.C Sec. 252(i) provides, in pertinent part, that a LEC must make available "[a]ny interconnection, service, or network element provides under an agreement . . . to which it is a party to any other requesting telecommunications carrier upon those same terms and conditions as those provided in the agreement."

~~not violate TA96. (*See, e.g., U.S. West v. Sprint Communications,* 275 F.3d 1241, 1250-52 (10th Cir. 2002)). Thus, SBC's arguments are meritless.~~

Verizon's Arguments

The Position of Staff is that the Plans ought to be tariffed, so that carriers can "buy services out of a tariff," without utilizing the negotiated interconnection agreement process. As Verizon points out, the Courts have ruled that such a process circumvents the interconnection agreement process, and, therefore, this process conflicts with, and is preempted by, TA96. (*See., e.g., Verizon North v. Strand,* 309 F.3d 935 (6th Cir. 2002)). In order to construct the Rule in a manner that does not invite litigation, we conclude that the Rule should not require carriers to tariff their Wholesale Service Quality Plans.[5]

Verizon has submitted an alternative to tariffing, which allows for periodic Commission review of Plans and it provides for Commission enforcement of the Rules requiring submitting updates to the Plans. Verizon's proposed language has been modified to address Staff's and McLeod's concern that the Rule should require Level 1 carriers to provide notice of any change to a Plan, as well as the opportunity to object to such a change. The modified language is as follows:

Section 731.205 Submission of Wholesale Service Quality Plans

a) On or before June ~~April~~ 1, 2004, and every three years thereafter, every Level 1 carrier shall submit to the Manager of the Telecommunications Division of the Commission its Wholesale Service Quality Plan as specified in, and pursuant to, Subparts B, C, D and E of this Part. Additional submissions shall be made each time a Level 1 carrier's wholesale service quality plan is amended. With each submission, the Level 1 carrier shall include a brief explanation of any changes to the plan. For any submission due after June ~~April~~ 1, 2004, if a Level 1 carrier proposes to maintain, without any additions, deletions or modifications, its existing wholesale service quality plan, the Level 1 carrier may file a submission to the Manager of the Telecommunications Division, in the form of a verified statement establishing that it proposes to maintain its existing plan in effect, without any additions, deletions or modifications.

b) Any carrier designated by the Commission as a Level 1 carrier pursuant to Sections 731.110 or 731.635 shall submit to the Manager of the Telecommunications Division its wholesale service quality plan

[5] A more in-depth analysis of *Verizon North v. Strand* is contained in the Analysis of Section IV(i), regarding Section 630 of the Rule.

within 90 days after its designation as a Level 1 carrier by the Commission, and, after one year from the submission of its initial wholesale service quality plan, shall submit all amended wholesale service quality plans pursuant to paragraph (a) of this Section.

c) If the Commission has reason to believe that implementation of a Level 1 carrier's wholesale service quality plan discriminates against a telecommunications carrier that is not a party to the agreement, or if the Commission has reason to believe that implementation of the plan is not consistent with the public interest, convenience and necessity, it may initiate a proceeding to investigate that wholesale service quality plan. After an investigation and notice and an opportunity to be heard, the Commission may modify, update, or in any way amend the plan prior to the end of the triennial period.

d) 45 days prior notice of any proposed change or modification to a Plan shall be served on the Manager of the Telecommunications Division of the Commission and all affected carriers via mail, with postage prepaid, or fax, or e-mail and shall be available for inspection on that Level 1 carrier's website. Any carrier contesting the proposed change must file, within 30 days after the date of service of the notice of the proposed change, a complaint, with the Commission, in which the complaining carrier sets forth the reasons it contests the change.

e) At any hearing regarding a change or modification to a plan, the carrier proposing the change or modification to the plan shall have the burden of proof to establish the justness and reasonableness of the changes or modifications.

Section 731.210 Investigations or Review of Wholesale Service Quality Plans

For each investigation or review of a wholesale service quality plan pursuant to Section 731.200(c), unless otherwise ordered by an Administrative Law Judge or the Commission, if the Administrative Law Judge or Commission determine that there is good cause to delay the proceeding, the Commission shall initiate a proceeding and schedule a prehearing conference (see 83 Ill. Adm. Code 200.300) to occur no more than 21 days after the initiation of the proceeding. The carrier submitting the Plan shall be a party to the proceeding. Other parties may intervene, pursuant to the Commission's Rules of Practice, 83 Ill. Adm. Code 200. The proceeding will be scheduled, unless otherwise ordered by the Administrative Law Judge or the Commission, if the Administrative Law Judge or Commission determine that there is good cause to delay the proceeding, so that a Proposed Order is presented to the Commission by the Administrative Law Judge no later than 6 months after the date of the initiation of the proceeding. The purpose of the investigation or review shall be to determine if a carrier's plan complies with the requirements of Subparts B, C, D and E of this Rule.

While McLeod argues that Verizon's alternative to tariffing essentially, does not have enough "teeth" to it, McLeod also specifically acknowledges that there may be a reasonable alternative to tariffing. Moreover, McLeod's contentions regarding Verizon's proposal are very vague. Finally, Sections 200(d) and (e) above address and resolve McLeod's arguments on this issue.

~~Verizon's question, essentially, is whether a Wholesale Service Quality Plan, which governs what occurs when telecommunications service is substandard, is something that is "provisioned or offered for rent, sale or lease or in exchange for other value received" of transmittal information, facilities used to providing such transmission, including "access and interconnection arrangements and services." (*See*, 220 ILCS 5/13-203). If a Wholesale Service Quality Plan falls within this definition, then, the Level 1 carriers are required to file tariffs describing the "applicable rates and other charges, terms and conditions of services . . ." (220 ILCS 5/13-501(a)).~~

~~Verizon focuses on the fact that the service provided is not offered in exchange for value; essentially, remedies paid by ILECs are in substitution for the previously bargained for services, if and when those services are not provided. However, Section 13-203 expressly includes "access and interconnection arrangements and services." (220 ILCS 5/13-203). Thus, Section 13-203 includes many items that are tangential to, but a necessary part of, the telecommunications services or commodities. Those arrangements and services include the details, the "fine print" of the financial and other arrangements for the provision of telecommunications services.~~

~~Section 3-116 of the Act further defines a "rate" as any compensation of any public utility "or any schedule or tariff thereof, and any rule, regulation, charge, practice or contract relating thereto." (220 ILCS 5/13-116). The term "rate," too, encompasses financial and other details that are a necessary part of providing services. (*See, e.g., Moenning v. Illinois Bell Telephone Co.,* 139 Ill. App. 3d 521, 525-26, 487 N.E.2d 980 (1st Dist. 1985), ruling that a rate includes rules regarding credit, including the requisites regarding security deposits; *Abbot Laboratories v. I.C.C.,* 289 Ill. App. 3d 705, 711-13, 682 N.E.2d 340 (1st Dist. 1997), ruling that the statutory definition of the term "rate" includes an unauthorized use charge; *Illinois Bell Telephone Co. v. I.C.C.,* 203 Ill. App. 3d 424, 437, 561 N.E.2d 426, (1st Dist 1990), ruling that rules governing refunds are "rates.")~~

~~We conclude that the terms in a Wholesale Service Quality Plan concerns when a service must be provided, how it must be provided, and other terms, such as financial arrangements, which are "access and interconnection arrangements and services" within the meaning of the statutory definition of "telecommunications services" in Section 13-203 of the Act. The previously-cited cases make it clear that the fine print regarding what sum of money a customer ultimately owes, or is owed, by a carrier, as are part of the "interconnection arrangements" within the meaning of Section 13-203, Those terms are~~

~~also part of any "rule, regulation, charge, practice or contract" and are part of the "rates" imposed, within the statutory definition of "rate" found in Section 3-116. Therefore, Wholesale Service Quality Plans must be tariffed. Because we conclude that Illinois law requires tariffing of Wholesale Service Quality Plans, we need not discuss Verizon's proposed alternative to tariffing.~~

f) Waivers for Level 1 Carriers

The Position of Verizon

Verizon desires to include in the Rule a provision that allows a Level 1 carrier to apply for, and receive, a waiver of any Section of the Rules that is applicable to a Level 1 carrier. Verizon contends that such a mechanism is a useful tool, in light of the fact that it is difficult to develop a Rule that conforms to each carrier's unique situation. (Verizon Initial Brief at 11-12).

The Position of the Wireless Coalition

The Wireless Coalition contends that the Commission should reject Verizon's proposal for a waiver of any particular section of the Rule. The Coalition opines that such waivers will only allow further delay in its ability to receive wholesale special access services that is not substandard. (Wireless Coalition Reply Brief at 12).

The Position of Allegiance

Allegiance finds Verizon's waiver provision to be unacceptable, as it does not provide for alternative means of filing, adjudicating the appropriateness of, and enforcing, the carriers' Wholesale Service Quality Plan, or any revisions to those Plans. (Allegiance Reply Brief at 19).

The Position of Staff

Staff contends that a waiver is unnecessary because Section 13-513 of the Public Utilities Act provides for a waiver of all of or of any part of any part of the Rule, if a carrier can demonstrate that the waiver would not harm consumers and would not impede the development or operation of a competitive market. Staff additionally argues that the Rule, all by itself, allows flexibility and individual treatment for the Level 1 carriers. Staff further avers that the proposal made by Verizon could lead to abuse. (Staff Reply Brief at 33-34).

Commission Analysis and Conclusions

We decline to adopt Verizon's waiver provision, which would allow any Level 1 carrier to be exempt from any requirement. Verizon did not establish a need for such a provision and none is apparent. Moreover, Verizon's provision, as proposed, could lead to abuse. Finally, as Staff points out, procedures already exist for waivers when they are truly needed. (*See,* Appendix, Sec. 220(c)).

g) Wholesale Special Access Services

1.) Commission Jurisdiction over Wholesale Special Access Services

Background

Wholesale special access services, generally, are dedicated non-switched transmission paths that connect various points on a carrier's transmission path. (*See, e.g.,* Appendix, Sec. 105). The Rule requires Level 1 carriers to include wholesale special access services in their Wholesale Service Quality Plans. However, the wholesale special access services that are covered by the Rule are only those services that fall under this Commission's jurisdiction. ~~only intrastate~~. (*Id)*.

The Position of SBC

SBC recognizes that the Rule only covers ~~intrastate~~ services that are subject to the Commission's jurisdiction. It argues that including intrastate special access services in the Rule does not make good policy sense, since, according to SBC, the majority of special access circuits are jurisdictionally interstate and thus, the majority of those services fall outside of the jurisdiction of this Commission and within the interstate jurisdiction of the FCC. SBC also claims that a Rule regarding intrastate special access services may conflict with the FCC's currently pending rulemaking regarding interstate special access services. (SBC Initial Brief at 15, 21 and 25).

The Position of Verizon

Verizon objects to including Wholesale Special Access Services in Part 731. Verizon argues that these services are primarily interstate services. (*See, e.g.*, Verizon Exhibit 1.0 at 11). Verizon argues that special access services are ~~is~~ currently subject to the FCC's Notice of Proposed Rulemaking addressing special access services and the Commission should defer imposing ~~the imposition of~~, any wholesale special access standards because such imposition could ~~may cause a~~ conflict with any ~~the~~ FCC ruling on the subject~~proceeding~~. (Verizon Initial Brief at 16).

In its Reply Brief, Verizon points out that while Staff contends that the definition of "wholesale services" in the Rule limits those services to telecommunications services that are subject to the Commission's jurisdiction, the Rule's current definition of "Wholesale Special Access" is not so limited. Verizon contends that the Rule should be clarified to avoid confusion. (Verizon Reply Brief at 28).

The Position of Staff

Staff points to the definition of "wholesale services," which includes only those services that are subject to the Commission's jurisdiction. (*See,* Sec. 105). Staff opines that it is highly unlikely that a conflict could arise between FCC regulation and the Rule, which concerns only intrastate services. Staff cites TA96, which provides, in pertinent part:

> Additional State Requirements. Nothing in this part precludes a state from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the state's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

(47 U.S.C. Sec. 261). Staff concludes that in order to further competition, TA96 expressly preserves the state authority to regulate intrastate services. Staff notes that the FCC is currently considering expanding the role that state commissions can play regarding interstate special access services, citing *In the Matte of Performance Measurement and Standards for Interstate Special Access Services,* CC Docket 01-339.

Staff disagrees with SBC's argument that the majority of the special access services are interstate in nature. Staff opines that there are enough intrastate special access circuits being ordered by carriers to warrant the imposition of standards, measurements and remedies for those ~~companies that order these~~ wholesale services. (Staff Exhibit 8.0 at 4-5).

The Position of the Wireless Coalition

The Coalition argues that most of the wholesale special access services it uses are intrastate and intra-LATA in nature. (*See, e.g.,* Wireless Exs. 1.0 at 3, 2.0 at 3, 5.0 at 5). Citing *In Re Performance Measurements and Standards for Interstate Special Access Services*, FCC Docket 01-339 at 7, the Coalition contends that because its members obtain wholesale special access services ~~from Level 1 ILECs~~ that are intrastate and intraLATA in nature, this Commission has jurisdiction over those services and the FCC has not preempted state regulation of these services. (*Id.* at 15).

The Position of Citizens

Citizens argues that the overwhelming majority of special access services ~~circuits~~ are jurisdictionally interstate. Citizens concludes that therefore, the rates and other terms of such services ~~circuits~~ are regulated by the FCC, not state commissions. (Citizens Reply Brief at 11-12).

The Position of WorldCom

WorldCom contends that the Commission has jurisdiction to regulate intrastate special access services. (WorldCom Reply Brief at 2-8).

Commission Analysis and Conclusions

The ILECs do not really contend that the Commission cannot regulate intrastate wholesale special access services. Rather, they generally dispute the purchasing carriers' contention that they use a considerable amount of intrastate wholesale special access services. However, the purchasing carriers are in the best position to know the nature of their special access circuits and they contend that most of their circuits are intrastate.

We are not also persuaded by the ILECs' arguments that regulation of these services might conflict with FCC rules regarding interstate services. The parties arguing this position have not supplied any ~~no~~ facts indicating that there is a real possibility of such a conflict. And, as Staff points out, TA96 specifically provides that state commissions can regulate such intrastate services.

However, Verizon makes a valid point, that the definition of "Wholesale Special Access" should be modified, in order to avoid confusion. Therefore, Section 105 of the Rule is amended to read, in pertinent part:

> 'Wholesale Special Access' means Wholesale Service subject to the Commission's jurisdiction . . .

(Appendix at 105).

2.) Whether Including Wholesale Special Access Service in this Docket Exceeds the Scope of the Commission's Authority ~~Enabling Statute~~

The Position of Staff

Staff cites the enabling statute, which provides:

> The Commission shall establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules.

(220 ILCLS 5/13-712(g)). Staff reasons that Section 13-712(g) gives the Commission very broad authority, without any specific direction as to what particular services the Rule should govern. It argues that the General Assembly neither mandated nor limited the Commission's ability to consider particular services, company size, level of competition, business rules, benchmarks, parity, or any of the other many issues that must be considered in the development of wholesale service quality standards. According to Staff, the General Assembly did not limit the authority it vested in the Commission to implement rules that only govern basic local exchange service, which <u>excludes</u> ~~would thereby excluding~~ wholesale special access services. (Staff Initial Brief at 29-31; Reply at 14).

Staff refers to paragraphs (c) through (f) of Section 13-712, which set forth service quality requirements for retail service. In each of those provisions, the General Assembly specifically referred to the term ~~"basic~~ "basic local exchange service." (220 ILCS 5/13-712(c), (d), (e) and (f)). Staff maintains that this term is absent from Section 13-712(g). Staff reasons that, if the General Assembly intended to limit wholesale service quality rules to "basic local exchange service," it would have placed the words "for basic local exchange service" in Section 13-712(g). Staff also posits that restricting the wholesale measures to "basic local exchange service" would eliminate a range of services needed by many CLECs to <u>provide service to end user consumers</u>. (Staff Initial Brief at 29-31).

<u>On Exceptions, Staff maintains that, rather than interpreting Section 712 *in toto*, Verizon has relied on the title of the statute. Staff avers that Verizon ignores the fact that the statute has other provisions that govern basic local exchange service quality issues. Staff points to the rules of statutory construction, which require a statute to be construed so that the plain meaning of the substantive provisions is not limited by that which is contained in a statute's title or heading. Staff points out that not every concept embodied in a law can be in that law's caption, or in its title. According to Staff, there are many, many wholesale services at issue here; Verizon's construction of Section 712(g) would require the General Assembly to set forth every wholesale service subject to the Rule in Section 712(g). (Staff Reply Brief on Exceptions at 11).</u>

<u>Staff also points out that both Verizon and SBC have conceded that some special access services are used to provision basic local exchange services, as SBC stated that special access is *primarily* used for long distance and wireless services, (SBC Brief on Exceptions at 19) and Verizon averred that special access *is not essential* for the provisioning of basic local exchange services. (Verizon Brief on Exceptions at 10; Staff Reply Brief on Exceptions at 11).</u>

The Position of the Wireless Coalition

The Wireless Coalition acknowledges that it does not provide "basic local exchange services." Still, it contends that the wholesale special access services it uses must be regulated by the Rule. (Wireless Initial Brief at 14). It argues that two phrases in Section 712(g) are pertinent: "carrier to carrier," and "wholesale services." The Coalition points to the statutory definition of a "telecommunications carrier," which is:

> any corporation . . . that owns controls, operates or manages . . . for public use, any plant, equipment or property used . . . in connection with telecommunications service between points within this State which are specified by the user.

(220 ILCS 5/13-202). Because the members of the Wireless Coalition are certificated to provide, and they do provide, telecommunications services for public use in this state, the Coalition reasons that they are "carriers" within the meaning of Section 712(g). (Wireless Initial Brief at 8). The Wireless Coalition acknowledges that the Act does not include a definition of "wholesale services;" however, it directs the Commission to review the definition of "retail telecommunications services," which specifically excludes wholesale services:

> [a] telecommunications service sold to an end user. 'Retail telecommunications service' does not include a telecommunications service provided by a telecommunications carrier to a telecommunications carrier, including to itself, as a component of, or for the provision of, telecommunications services.

(220 ILCS 5/13-220). The Coalition contends, essentially, that the special access services in question fit within the statutory exclusion of wholesale services, which is the subject of this docket. The Coalition additionally argues that the General Assembly directed the Commission to establish rules and remedies governing any and all inter-carrier transactions involving wholesale telecommunications services, which the Coalition provides, ~~under~~ pursuant to its construction of the exclusion of "wholesale services" found in Section 13-220. (Wireless Initial Brief at 8-9).

The Coalition argues that limiting the scope of this docket would violate established standards of statutory construction, as the enabling statute, Section 712(g), does not limit the rules to be promulgated to those regarding basic local exchange services. The Coalition further contends that the Commission cannot read a limitation into Section 712(g) when it is not there. (*Id.* at 13-14).

The Position of AT&T

AT&T maintains that wholesale special access services should be included in the Rule. It points to other portions of Section 712 and concludes that the grant of authority in Section 712(g) is much broader than what is required by other parts of Section 13-712. (AT&T Initial Brief at 6).

AT&T maintains that the Level 1 ILECs' attempt to limit the Rule to "basic local exchange services" would "gut" the entire Rule, as the wholesale services provided from one carrier to another are not "basic local exchange services." Instead, according to

AT&T, those services are a broad range of wholesale services that CLECs use to provide telecommunications services to their ~~its~~ customers. Thus, AT&T reasons, Part 731 should govern the wholesale services provided by ILECs to CLECs, and not the resultant retail services the CLECs offer to end users. (AT&T Reply Brief at 13).

The Position of Verizon

Verizon posits that special access services are "access services," and, therefore, they is not basic local exchange services subject to regulation pursuant to Section 13-712(g). (*See,* Verizon Ex. 6.0 at 3; Initial Brief at 8). Verizon maintains that wholesale special access services should not be included in the Rule because, according to Verizon, such services are not within the scope of the enabling statute.

Citing well-established principles of statutory construction, Verizon maintains that a regulation promulgated by an administrative agency cannot exceed the scope of the authority in the statute authorizing such promulgation.

Verizon also points to the order initiating this docket, which states, in pertinent part:

> . . .The Public Act added Section 13-712 to the Act. This Section deals with basic local exchange service quality. Subsection (g) states:
>
> The Commission shall establish and impellent carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules.
>
> This mandate necessitates the initiation of a rulemaking proceeding to establish the required rules.

(Initiating Order, Docket No. 01-0539). Verizon concludes that the Commission defined the scope of this docket with this language to exclusively include "basic local exchange services." (Verizon Initial Brief at 5-8; Brief on Exceptions at 5-7).

Verizon also looks to the caption of Section 13-712, which is entitled "Basic Local Exchange Service Quality; Customer Credits." (220 ILLCS 5/13-712). Verizon points to the legislative statement of intent, which is articulated in Section 13-712(a). It provides:

> It is the intent of the General Assembly that every telecommunication carrier meet minimum service quality standards in providing basic local exchange service on a non-discriminatory basis to all classes of customers.

(220 ILCS 5/13-712(a)). This language, Verizon concludes, limits the scope of the Rule to be promulgated in this proceeding to basic local exchange services. (Verizon Brief on Exceptions at 5-7).

On Exceptions, Verizon argues that, if the General Assembly meant to for the Rule to include wholesale special access services, it would have made specific reference to such services in Section 712(g).

Verizon also contends the ALJPO inexplicably rejected credible evidence presented by both Verizon and SBC regarding the nature of special access services. In support, it cites the credentials of one of its witnesses, Mr. Holland. It additionally posits that, over time, market forces would remedy any problem with such services. (Verizon Brief on Exceptions at 10-12; 18).

The Position of Citizens

Citizens maintains that wholesale special access services should not be included in the Rule. Citizens cites Verizon's argument in support of its contention that wholesale special access services are not basic local exchange services. (Citizens Reply Brief at 11).

The Position of SBC

SBC contends that special access services are not “basic local exchange services,” and therefore, the Rule should not include such services. SBC argues that wholesale special access services “are provided to carriers primarily for long-distance and wireless services, neither of which qualifies as basic local exchange service.” (SBC Initial Brief at 16).

The Position of WorldCom

WorldCom posits that a policy enunciated in the Act is to promote competition in Illinois. (WorldCom Reply Brief at 19). WorldCom contends that restricting measures to “basic local exchange services” would eliminate a range of services that are needed by many CLECs; thus, eliminating those services from the Rule hinders competition. WorldCom points out that there is nothing in Section 712(g) indicating that the General Assembly intended to limit or restrict the Commission’s authority to establish rules regarding only “basic local exchange services. “ (*Id.* at 19-20).

The Position of Allegiance

With regard to Verizon’s contention that the Commission limited the scope of this docket in its initiating order, Allegiance concludes that limiting the Rule to cover “basic local exchange services” is a substantive issue, which the Commission would not, and could not, determine with finality in the initiating order before an evidentiary hearing on the subject. (Allegiance Reply Brief at 8). Allegiance points out that the initiating order is only an interim order, which can be revised, corrected or superceded by the Commission in a final order, after the parties have had notice and an opportunity to be heard on the subject.

Allegiance avers that Verizon and SBC are factually incorrect when they argue that wholesale special access services are not used to provision basic local exchange services, as special access services are used by purchasing carriers to service retail customers. Allegiance reasons that the scope of this docket includes services used on a wholesale basis by carriers to provide basic local exchange services, irrespective of whether those services, in and of themselves, are "basic local exchange services." Allegiance concludes that wholesale special access services, which are used by carriers to provide basic local exchange services, must be included in this docket. (*Id.* at 9).

Commission Analysis and Conclusions

The Legal Arguments

This Docket commenced implementing Section 13-712(g) of the Act, which provides, in its entirety, as follows:

> The Commission shall establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules.

(220 ILCS 5/13-712(g)). The question posed by the parties' arguments above is what wholesale services should be included in Part 731, as the statute does not so specify.

When construing a statute, effect must be given to the intent of the legislature. (*Wal-Mart Stores, Inc., v. the Industrial Comm.,* 324 Ill. App. 3d 961, 967, 755 N.E.2d 98 (1st Dist. 2001)). To ascertain the legislative intent, tribunals must begin by examining the language of the statute, reading the statutory scheme as a whole, and construing it so that no word is rendered superfluous. (*Id)*. Clear and unambiguous statutory language must be given effect, without resort to other aids of construction. (*Id)*.

Section 13-712(a) declares that it is the intent of the General Assembly that each telecommunications carrier meet minimum service quality standards in providing basic local exchange service on a non-discriminatory basis to all classes of customers. This language clearly indicates that Section 13-712, in general, was intended to foster competition and to ensure that the ultimate consumer of telecommunications services, the end user, has adequate telephone service, irrespective of what type of carrier provides services to that consumer.

Section 712 is entitled "Basic Local Exchange Service Quality: Customer Credits," which is some support for the ILEC position that wholesale special access services should not be included in the rule. On the other hand, as Staff points out, the General Assembly often referred to "basic local exchange service" in Section 612,~~the statute,~~ and yet, absent from Section 712(g) is any mention of this term. As Staff and the Wireless Coalition have noted, we are required to construe Section 712(g) in accordance with its plain meaning, without adding exceptions, limitations or conditions. (*Divane v. Chicago Board of Education,* 332 Ill. App. 3d 548, 553, 774 N.E.2d 361 (1st Dist. 2002); *People v. Young,* 92 Ill.2d 236, 241, 441 N.E.2d 641 (1982)).

On its face, Section 712(g) is not limited to "basic local exchange services." And clearly, when the General Assembly enacted the statute, it was familiar with the term "basic local exchange services," as it used that terms in many other places in the statute. The statute also contains a definition of "basic local exchange services" which is "[r]esidential and business lines used for local exchange telecommunications services as defined in Section 13-204 of this Act . . ." (220 ILCS 5/13-712(b)(2)). The presence of this definition is further indicia that, when drafting Section 712(g), the General Assembly was familiar with the term "basic local exchange services." Therefore, we conclude that the General Assembly's exclusion of the term "basic local exchange services" from Section 712(g) is not accidental.

The legislative intent regarding the scope of this proceeding is not crystal-clear. However, when Section 13-712(g) is viewed in light of the rest of Section 712, it becomes evident that Section 13-712(g) was intended to allow the Commission to promulgate a Rule that sets service quality standards that ensure that the end user customers do not receive substandard service. We note that Subsection (e)(4) of the statute is expressly limited to wholesale service quality failure affecting basic local exchange services. (220 ILCS 5/13-712(e)(4)). If the General Assembly wanted to limit the services in this Rule to matters concerning only basic local exchange services, it would have placed the same limitation in Section 712(g), which it did not do. ~~on a wholesale basis, in the provisioning of basic local exchange services, irrespective of whether those services, in and of themselves, are "basic local exchange services."~~ This construction reconciles the difference between the language in Section 712(g) and other portions of the statute, as, while some other portions mention "basic local exchange services," Section 13-712(g) concerns what is involved in the provisioning of ~~such~~ telecommunications services on a wholesale basis. Also, Verizon's construction of the Rule ignores the General Assembly's focus in Section 13-712(a), which is on providing quality service for the end user customer. Moreover, it does not make sense to limit wholesale service quality standards to "basic local exchange services," as what a carrier provides to another carrier on a wholesale basis is not "basic local exchange services."

As AT&T points out, any other construction would effectively "gut" the Rule, as there are a broad range of wholesale services that are involved in the provisioning of telecommunications services to wholesale customers, many of which, really are not, in and of themselves, the provisioning of "basic local exchange services." If we construed Section 712(g) to include only "basic local exchange services," we would be placing a restriction in that statute that is not there. ~~which~~ We are bound by well-established principles of statutory construction to refrain from placing extra words in a statute. ~~doing.~~

(*Divane,* 332 Ill. App. 3d at 553). Moreover, it is well-settled that headings and titles of statutes cannot undo or limit that which the text makes plain. A heading or title cannot be used as a means of creating an ambiguity when the body of the law itself is clear. (*Michigan Avenue Bank v. County of Cook,* 191 Ill.2d 493, 506, 732 N.E.2d 528 (2000)).

We also conclude that any reference to "basic local exchange services" in the initiating order for this docket was made only as a short-hand reference to the general statutory scheme. It would be inappropriate to construe a short-hand reference made in the initiating Order as a Commission determination that this docket, which was initiated pursuant to Section 13-712(g), was limited to basic local exchange services.

In Section 13-712(g), the General Assembly gave this Commission a broad grant of authority, with no restrictions as to what type of wholesale services the Rule may govern. This broad grant of authority sharply contrasts with several other portions of Section 13-712, which are very narrow and specific. (*See, e.g.,* 220 ILCS 5/13-712(d) and (f)). We additionally note that, as Staff points out, including wholesale special access services in the Rule promotes competition in Illinois and it helps ensure that Illinois consumers receive adequate phone service, the enunciated goals of Section 712. (220 ILCS 5/13-712(a)). Therefore, inclusion of wholesale special access services in the Rule helps foster an obvious goal of legislature—to ensure that consumers receive reliable telecommunications service that is not substandard.

The Factual Arguments

There is evidence establishing that wholesale special access services are used by carriers purchasing wholesale services to provision "basic local exchange services." Moreover, we have previously concluded that the General Assembly has not limited the Rule to "basic local exchange services." We therefore conclude that such services can be included in the Rule.

Also, while Verizon and SBC argue that the testimony regarding wholesale special access services should not be considered because it is outside the scope of this proceeding, they could have sought exclusion of this testimony through a pretrial motion to bar evidence on the subject, through objection to admission of testimony into evidence and the use of other well-established legal procedures that were available to them. The parties contesting the inclusion of wholesale special access services in this proceeding did nothing to exclude evidence regarding this subject. If these parties were really of the opinion that wholesale special access services exceed the scope of this docket, they undoubtedly would have utilized the basic legal tools available to them to exclude the evidence that they felt exceeded the scope of this docket.

Verizon provides only one factual citation in the record to support its contention that wholesale special access services are not provisioned in order to supply "basic local exchange services." That is the rebuttal testimony of its witness, Jerry Holland, who concluded as follows: "Special access is an access service, ordered almost exclusively as an interstate service . . . ." Verizon provides no additional factual support for this factual conclusion that wholesale special access services are not used to provision "basic local exchange services." (*See,* Verizon Initial Brief at 8). This conclusion does not have a factual basis in this record, and, therefore, we cannot consider it. (*Statler v. Catalano,* 167 Ill. App. 3d 397, 410-11, 521 N.E.2d 565 (5th Dist. 1988); *Kafka v. D.E.S., Inc.,* 265 Ill. App. 3d 310, 314, 638 N.E.2d 663 (1st Dist. 1994)).

Mr. Holland's testimony on this issue concerned facts, not his expert opinion on a subject. Therefore, for Mr. Holland's factual conclusion to be considered by a trier of fact, there must be a evidentiary foundation setting forth the basis of the witness' knowledge as to the fact in question. (*Statler,* 167 Ill. App. 3d at 410-11). While Mr. Holland's background was set forth in his prefiled testimony, there is nothing stating or establishing that, based on his background or general experience in the industry, he knows that special access services are not used to provision "basic local exchange services." Additionally, even if the basis for that knowledge could be inferred, other evidence contradicted Mr. Holland's testimony on this issue. Therefore, Mr. Holland's testimony, in and of itself, does not establish that special access services are not used to provision "basic local exchange services." Also, as the Wireless Coalition points out, it appears that this portion of Mr. Holland's testimony was stricken at the evidentiary hearing. (Tr.191-193).

Verizon's assertion also ignores other evidence presented, such as the rebuttal testimony of WorldCom witness Karen Furbish, who testified that WorldCom, a very large facilities-based CLEC, uses wholesale special access services it purchases from ILECs to provide service to commercial and institutional customers in Illinois. (WorldCom Ex. 1.1 at 8, 9-10). This testimony is indicia that carriers can, and do, use such wholesale special access service services to provide "basic local exchange services."

SBC contends that wholesale special access services "are provided to carriers primarily for long-distance and wireless services, neither of which qualifies as basic local exchange service." SBC provides no factual or legal basis for this conclusion, therefore, we cannot consider it. (*Statler,* 167 Ill. App. 3d at 410-11). Also, even SBC seems to acknowledge that wholesale special access services are used to provide basic local exchange services, as this statement contains a qualification, the word "primarily."

Finally, as will be explained below, since extensive evidence was presented on the issue establishing that there is an urgent need for rules governing service quality of special access services, it is evident that if this issue is not addressed here, it will merely arise in another Commission docket at another time, which would require re-litigation of a complicated issue that is already before us. Deferring the issue, therefore, would only cause the parties and Commission Staff to waste a considerable amount of time and effort and delay giving consumers the service quality they deserve.

3.) Whether there is a Need to Regulate Wholesale Special Access Services

Background

The Rule proposed by Staff provides that "[t]he services to be covered for a Level 1 carrier shall include wholesale special access services, and shall include wholesale special access measures for ordering, provisioning, and repair. . . " (Appendix, Sec. 305).

The Position of the Wireless Coalition

Several Wireless Coalition witnesses testified that, as a matter of pattern and practice, many aspects of the special access services provided by Level 1 carriers have been poor and unreliable. Ordering processes are unclear and orders are often delayed. Also, according to these witnesses, the information the Level 1 carriers provide to Wireless Coalition members regarding ordering procedures is not consistent and it is erratic. The evidence indicated that during the first five months of 2002, SBC failed to timely install approximately 40% of the circuits PrimeCo ordered, and those installations were late by approximately ~~7~~ seven days. (*See,* Wireless Ex. 1.0 at 8). The testimony also established that the Level 1 carriers do not timely complete engineering, do not provide notice of the date of installation of special access circuits and do not install those circuits in a timely manner. Also, according to the Wireless Coalition witnesses, it often takes an inordinate amount of time before failed circuits are repaired. (*See, e. g.,* Wireless Exs. 1.0 at 4, 6; 2.0 at 11-12; 3.0 at 3-4; 5.0 at 7; 7.0 at 6).

Additionally, Wireless witnesses testified that the circuits provisioned frequently fail. That is, those circuits do not always work. When the circuits do not work, cell site-switch connections are lost, wireless telephone signals cannot be transported and wireless telephone calls cannot be completed. A single circuit failure will cause a cell site to go completely out of service, and services at cell sites served by multiple circuits can become overloaded. When a cell site goes down, ongoing telephone calls are dropped, and customers may be unable to place or receive any new telephone calls until the failed circuit is repaired. Also, the quality of the call may be adversely affected by weak signals coming from the area of a "downed cell site." (Wireless Exs. 2.0 at 6; 12; 6.0 at 6-7). Wireless Coalition members testified that the failure of special access circuits causes them unnecessary expense resulting from "handling the problems" associated with the failed circuits as well as a loss of revenue resulting from ~~as a result of~~ missed telephone calls. (Wireless Initial Brief at 21).

The Wireless Coalition also presented evidence that some Level 1 monthly performance reports are untimely and they contain data that does not match the data of the Wireless members. Those members aver that they, on many occasions, have been unable to resolve those discrepancies with the **I**LECs, but the ILECs have refused to attempt to resolve these disputes. (Wireless Exs. 1.0 at 5; 2.0 at 7; 6.0 at 8). Also, carriers do not provide these reports to regulatory bodies. (Tr. 586). Some carriers do not provide performance reports. (Wireless Ex. 1.0 at 5; 2.0 at 6; Tr. 225).

The Wireless Coalition contends that it loses significant revenue, and its customers experience significant problems, due to these problems with wholesale special access circuits. The Wireless Coalition therefore seeks, in this docket, to establish performance measures, standards, and remedies in order to "prompt" improvements for wholesale special access service quality. (Wireless Initial Brief at 6). The Wireless Coalition posits that, in the absence of enforceable service quality rules and reporting requirements, there is no way to ensure that Level 1 ILECs will consistently provide reliable wholesale special access services. (*Id.* at 22).

The Coalition also points out that currently, most of its members purchase services pursuant to private contracts, thus, the tariff credits for poor performance contained in Wholesale Service Quality Plans do not apply to the services they purchase. The Coalition further points to evidence elicited on cross examination of SBC and Verizon witnesses, that ILEC reporting to the wireless carriers is very limited, and, that the Level 1 carriers' existing Plans do not include performance measures or remedies for wholesale special access services. ~~measures and remedies in SBC's Wholesale Service Quality Plan are also very limited~~. The Wireless Coalition further points to evidence establishing that SBC does not resolve discrepancies between its performance data and that of a coalition member, even when that information is verifiably inaccurate. (*See,* Wireless Coalition Reply Brief at 9).

The Position of Staff

Staff argues that wholesale special access services have become a significant means by which carriers provide telecommunication services in Illinois. (*See, e.g.,* Tr. 424-25). Staff cites WorldCom Witness Karen Furbish, who testified:

> Yes, clearly incumbent LECs like SBC-SBC and Verizon are still dominant in the provision of all last-mile facilities, whether a competing carrier must order the large ILECs' facilities as UNEs, or EELs, or intrastate Special Access, or--most often--as interstate Special Access. Competitive LECs, IXCs, and wireless carriers are dependent on the ubiquitous 'last mile' facilities of incumbent LECs like SBC-SBC and Verizon to compete for larger-volume business and government customers, or to connect cell sites.

(*See,* WorldCom Exhibit 1.0 at 8). It is The Position of Staff that including Wholesale Special Access Services in the Rule recognizes the dependence of competitive carriers upon ILECs for special access services.~~ in the provision of to provide telecommunication services in Illinois~~. Staff also argues that many carriers assert that they need wholesale service quality standards for special access services. Staff also disagrees with Verizon's contention that its service quality regarding wholesale special access is so good that it should not be regulated. According to Staff, Verizon has ignored the evidence that is inconsistent with its position. (Staff Reply Brief on Exceptions at 11-12).

The Position of SBC

SBC claims that imposition of special access performance measures under the Rule could create problems for existing special access services and customers. Essentially, SBC argues that it would be expensive, time-consuming, and disruptive to replace whatever existing arrangements SBC has in place with the standards and remedies imposed by Part 731. (SBC Exhibit 1.20 at 8; Initial Brief at 13).

SBC further asserts that it already provides its wholesale customers with measures, standards and remedies for wholesale special access service providers. It provides 69 of its wholesale special access customers with monthly performance reports. (SBC Initial Brief at 13-15). The Company posits that it has implemented several tools to improve its performance with regard to wholesale special access services. SBC further argues that there is no need to include special access services in the Rule as the market has already established remedies and standards for those services. (*Id.* at 14, 16).

One of the Wireless Coalition witnesses, Mr. Tsuyuki, testified as to his experience at PrimeCo with SBC-provisioned wholesale special access services. His testimony established that in his experience, SBC provisioned very poor quality of service. SBC also argues that, at the hearing, it was incorrectly denied the opportunity to impeach Mr. Tsuyuki ~~a witness~~ with an advertisement for Mr. Tsuyuki's' company-employer. According to SBC, advertisements for a company ~~such evidence~~ can be used to impeach the credibility of a witness.[6] (SBC Initial Brief at 16-17). SBC maintains on Exceptions that the advertisements in question were not hearsay because they were party-admissions. SBC further contends witnesses can be impeached by contradictory facts that SBC claims were in the advertisement. Thus, it avers that , according to the rules of evidence tit was error not to allow the impeachment of Mr. Tsuyuki's credibility with the advertisement for PrimeCo. (SBC Brief on Exceptions at 22).

SBC further posits that it would be inappropriate to alter the competitive balance by regulating Level 1 provision of wholesale special access services, while leaving other competing providers alone. Also, according to SBC, the market has already established standards and remedies for those services. (SBC Brief on Exceptions at 19-21).

The Position of Verizon

[6] At the evidentiary hearing, SBC's motion to make an offer of proof on this issue was granted and it made an offer of proof on the issue.

Verizon argues that the record in this docket does not support including ~~the inclusion of~~ special access services in the Rule. Verizon points to the fact that most of the evidence presented by the parties regarding the current level of quality of wholesale special access concerned SBC's performance. (Verizon Initial Brief at 8-9). Verizon posits that it is not fair to Verizon to include ~~would be unfairly burdened by the inclusion of~~ wholesale special access services in the Rule because SBC's service quality is poor. (*Id.* at 10). Verizon concludes that the complaint process and the Commission investigation process are ~~much~~ better-suited to addressing issues relating to one carrier. (Verizon Reply Brief at 23).

Verizon additionally contends that the Wireless witnesses that testified regarding Verizon's service quality were disingenuous. (U.S.Cellular Exs. 5.0 and 6.0; Verizon Ex. 6 at 6-8). Verizon argues that the statements made by those witnesses were unsupported conclusions that were totally discredited with facts and statistics in the rebuttal testimony of its witness, Mr. Holland. Verizon notes that U.S. Cellular's counsel (counsel for the Wireless Coalition) did not cross-examine Mr. Holland. (*See, e.g.,* Verizon Brief on Exceptions at 14-16).

Commission Analysis and Conclusions

The evidence, briefly summarized above, demonstrates a need to regulate ~~for regulation of~~ wholesale special access services. Without regulation, consumers will continue to experience poor voice quality and phone calls that they are unable to complete. Several Wireless Coalition employees testified as to a pattern and practice of poor performance and SBC provided little in the way of evidence indicating that this pattern and practice is not accurate. Moreover, it appears that currently, there is little choice for wireless carriers, that is, it appears that the wireless carriers must almost always use the services of ILECs.

We note that SBC does not argue that its special access services are good, it contends that it is improving those services. (*See, e.g.,* SBC Initial Brief at 15). While we applaud SBC's attempt to improve those service, implicit in its argument is an acknowledgement that the services it provides, in this context, need some improvement.

And, while SBC argues that it will be unduly burdened by the Rule, its evidence was not specific as to what onus it would suffer or why. Moreover, there are sufficient methods in place to allow carriers to amend their interconnection agreements to conform to new regulations. We are not persuaded by SBC's arguments that it will be burdened by the regulation of wholesale special access services.

With regard to SBC's argument regarding impeachment of a witness with an advertisement, SBC cites no legal authority in support of its argument ~~that it should have been allowed to impeach a Wireless Coalition witness with an advertisement~~. Therefore, we cannot consider this argument. (*Statler,* 167 Ill. App. 3d at 410-11). Moreover, an advertisement is an assertion, of obviously questionable factual validity, of a company. Such an unverified document, which was not authored by the witness in question, has nothing to do with the credibility of that witness, which is the subject of impeachment evidence.

On Exceptions, SBC again refuses to cite any legal authority in support of argument that the rules of evidence allow it to impeach the credibility of Mr. Tsuyuki, a Wireless witness, with an advertisement for Primeco.[7] SBC maintains that the statements in the advertisement are facts that contradict Mr. Tsuyuki's testimony. Also, according to SBC, the advertisement is a party-admission. By failing to cite any authority, SBC has again waived its right to assert this argument. (*Statler,* 167 Ill. App. 3d at 410-11).

Even if SBC had not twice waived its right to assert a legal argument by failing to cite legal authority, SBC's application of the rules of evidence is incorrect. In order to establish that a statement is a party admission, the party offering the statement must establish that the declarant was an agent or employee of the party; the statement was made about a matter over which the declarant had actual or apparent authority; and the declarant spoke by virtue of his authority as an agent or employee. (*Jenkins v. Dominick's Finer Foods,* 288 Ill. App. 3d 827, 834,681 N.E.2d 129 (1st Dist. 1997)). None of these elements is present. Finally, while it is certainly correct that witnesses can be impeached with facts that contradict their testimony, (*See, e.g., People v. Hassan,* 253 Ill. App. 3d 558, 576, 624 N.E.2d 1330 (1st Dist. 1993), the contradictory assertion was in an advertisement. Therefore, even if counsel for SBC were allowed to impeach Mr. Tsuyuki with the advertisement, that "impeachment" would have very little weight, as there was no evidence that the advertisement was reliable or even accurate.

Additionally, as a practical matter, allowing counsel to pursue this line of questioning would have yielded little, if any results for SBC. Mr. Tsuyuki's testimony regarding the poor service quality he received from SBC was not the only evidence on the subject. (*See, e.g.,* Wireless Exs. 5.0 at 7 and 7.0 at 6). If Mr. Tsuyuki were impeached, other, credible evidence remains establishing that SBC provisions a poor quality of service for wholesale special access services.

Furthermore, while SBC contends that it is unfair to require only Level 1 carriers to establish measures and standards for provisioning wholesale special access services, SBC ignores the fact that the evidence presented established that the vast majority of wholesale special access services are provisioned by Level 1 carriers. Moreover, the Rule provides that if a Level 2 carrier provisions Level 1 services, which would include wholesale special access services, it may be required to conform to Level 1 requirements regarding the Level 1 service provisioned. (See, Appendix, Sec. 635). Therefore, SBC's argument lacks a basis in fact.

[7] Mr. Tsuyuki's testimony establishes that he was a Primeco employee.

Verizon argues that the evidence, in large part, indicated that the poor service experiences were with SBC. Verizon reasons that it should not be "punished" for SBC's conduct. However, there was evidence that Verizon's service was also unreliable. While Verizon contends that it established that the evidence regarding its conduct was "disingenuous," the Wireless Coalition proffered evidence indicating that generally, its statistics did not match those of the ILECs and the ILECs refused to acknowledge that their data was wrong. Thus, at best, the record reflects that the Wireless Coalition had one set of statistics, and Verizon had another set of statistics. In addition to the statistics, moreover, the Wireless Coalition presented evidence as to their general experiences with carriers, including Verizon, regarding wholesale special access services. The evidence does not establish that that the evidence proffered by the Wireless Coalition was disingenuous, or even wrong.

For the reasons stated above, we conclude that the parties have established that there is a need to include wholesale special access services in the Rule.

4.) Section 105: The Wireless Coalition's Revised Definition of Wholesale Special Access

The Wireless Coalition contends that the definition of "wholesale special access" in the Rule must encompass all elements of wholesale special access services they use to provide wireless telecommunications services. Currently, the Rule provides that:

> 'Wholesale Special Access' means a Wholesale Service utilizing a dedicated non-switched transmission path used for carrier-to-carrier services from the customer's NID (Network Interface Device) or POI (Point Of Interface) to the carrier's POI (Point Of Interface). A non-switched transmission path may include, but is not limited to, DS1, DS2, and OCn facilities as well as links for SS& signaling, database queries, and SONET ring access.

(*See,* Appendix, Sec. 105). The Wireless Coalition maintains, essentially, that the transmission path for these services can be more complicated that what is expressed in the current version of the Rule, as the connections can be between: a) network elements within an ILEC's network; b) the networks of different ILECs; or c) a wireless or ILEC's network and the network of a CLEC or an IXC. (*See,* Wireless Initial Brief at 23-24). The Wireless Coalition proposes the change below to incorporate these points of interconnection:

> 'Wholesale Special Access' means a Wholesale Service utilizing a dedicated non-switched transmission path used for carrier-to-carrier services from the customer's NID (Network Interface Device) or POI (Point Of Interface) to the carrier's POI

> (Point Of Interface) to one or more of the following: the Provisioning Carrier's POI (Point Of Interface); Another NID or POI on the Requesting Carrier's Network; or another carrier's network. A non-switched transmission path may include, but is not limited to, DS1, DS2, and OCn facilities as well as links for SS7 signaling, database queries, and SONET ring access. 'Wholesale Special Access' includes Wholesale Special Access Services provided to a wireless carrier or other telecommunication carrier.

The Wireless Coalition cites the testimony of Mr. Tsuyuki, who explained that Staff's definition only encompasses part of the critical wholesale special access services that wireless telecommunications carriers utilize to provide services to their customers. (Wireless Ex. 3.0 at 3). He also stated, in detail, why Staff's proposed definition did not encompass of special access services in question. (*Id;* Tr. at 835, 847).

~~No party objected to the Wireless Coalition's proposed change.~~

The Position of Staff

In its Brief on Exceptions, Staff contends that the Wireless Coalition did not provide it with a rationale or explanation for the changes it requested. Thus, Staff has not investigated the validity of the Wireless Coalition's argument. Staff additionally contends that the Wireless Coalition's proposal is not adequately supported by the record. (Staff Brief on Exceptions at 4).

Commission Analysis and Conclusions

The Wireless Coalition argues, essentially that the current definition does not cover all situations involved in the use of wholesale special access services. No party has presented evidence or arguments indicating that the Wireless Coalition's argument is incorrect. We note that the Wireless Coalition pointed to specific testimony why Staff's proposed language is inadequate. Therefore, we conclude that the Rule should be amended to incorporate the change proposed by the Wireless Coalition. (*See,* Appendix, Sec. 105).

5.) Section 105: WorldCom's Revised Definition of Wholesale Special Access

WorldCom suggests that Staff's definition of Wholesale Special Access is too restrictive. (WorldCom Ex. 1.0 at 17; Initial Brief at 9-10). WorldCom's proposed Wholesale Special Access definition is as follows:

> ‘Wholesale Special Access’ means a Wholesale Service that provides a non-switched transmission path between two or more points, either directly, or through a central office, where bridging or multiplexing functions are performed, not utilizing ILEC end office switches. Special access services may include dedicated and shared facilities configured to support analog/voice grade service, metallic and/or telegraph service, audio, video, digital data service (DDS), digital transport and high capacity service (DS1, DS3 and OCN), collocation transport, links for SS7 signaling and database queries, SONET ring access, and broadband services.

The Position of Staff

Staff contends that WorldCom’s definition provides greater detail regarding the transmission path and included services. It is Staff’s view that the level of detail in WorldCom’s definition may actually cause that definition to be interpreted in a manner that may be more restrictive than the current definition. Staff maintains that its definition is more desirable because it is more all-inclusive. Staff also points out that there is no industry consensus regarding the definition of some of the identified services.

Commission Analysis and Conclusions

We agree with Staff that WorldCom’s definition is too specific and that an all-inclusive approach to the definition is more desirable. We decline to incorporate WorldCom’s changes into the definition of wholesale special access services.

6.) Adoption of WorldCom’s JCIG Measurements

The Position of WorldCom

WorldCom, which is one of the largest facilities-based CLECs in the country, relies substantially on ILEC facilities to compete for larger business and institutional customers’ “last mile.” WorldCom relies upon ILECS about 90% of the time to meet these requirements. In Illinois, to provide services to business and institutional customers, WorldCom relies on Level 1 ILEC special access facilities approximately 95% of the time. WorldCom recommends that the Commission require Level 1 carriers to report wholesale special access performance, based on the set of eleven core metrics, developed by a national coalition of CLECs and IXCs (interexchange carriers). These metrics are encompassed in the JCIG special access metrics that were entered into the record attached to WorldCom Witness Furbish’s Direct testimony. (WorldCom Initial Brief at 20-22; WorldCom Ex. 1.0, Appendix B).

The Position of SBC

SBC argues that the Commission should reject WorldCom’s proposals, as those proposals were advanced without any evidentiary support. (SBC Initial Brief at 21).

The Position of Verizon

Verizon maintains that the Commission should not adopt WorldCom's metrics, as, according to Verizon, WorldCom did not present prefiled testimony to support these metrics. (Verizon Reply Brief at 31).

Commission Analysis and Conclusions

We decline to adopt WorldCom's set of performance measures and remedies. As SBC and Verizon point out, there is no evidence establishing that these measures and remedies are necessary or practicable.

h) Section 410: Additional Level 1 Reporting Requirements-Website Links

The Position of SBC

SBC seeks to have Section 410 revised to require the Commission Staff to post on its website a reference and a link to the ~~a~~ carrier's Wholesale Service Quality Plan that is posted on that ~~the~~ carrier's website. (SBC Initial Brief at 23-22).

The Position of Staff

Staff has no objection to SBC's proposal. (Staff Reply Brief at 22).

Commission Analysis and Conclusions

SBC's point is well-taken. Section 410(a) is revised as follows:

> A wholesale service quality plan adopted pursuant to Subpart E shall be posted to both the Commission's web site, with a reference and a link to the pertinent carrier's wholesale service quality plan at its website, and the Level 1 carrier's web site no more than thirty (30) days after entry of the Commission's order adopting such Plan.

(*See,* Appendix, Sec. 410(a)).

j.) SBC's Proposal to Delete Subsection 500(b)(5) (Renumbered as 505(b))

Background

Section 505(b) describes the criteria that the Commission shall consider and address when adopting a Wholesale Service Quality Plan. Generally, these criteria include the comprehensiveness, clarity, meaningfulness, and accuracy of the proposed Wholesale Service Quality Plan. (Staff Ex. 1.0 at 24-25). Subsection 505(b)(5) requires the Commission, when considering whether to adopt a Wholesale Service Quality Plan, to address and consider whether liability under the plan's enforcement mechanism would actually accrue at significant monetary levels when performance standards are missed. ~~whether liability under the Plan's enforcement mechanism would actually accrue at a meaningful and significant level when performance standards are missed.~~ (Appendix, Sec. 505(b)(5)). Subsection 505(b)(4) requires the Commission to also consider whether liability under the plan's enforcement mechanism would accrue at significant monetary levels when performance standards are missed. ~~whether the Plan subjects the Level 1 carrier to potential liability sufficient to provide a meaningful and significant incentive to comply with the performance standards.~~ (Appendix, Sec.505(b)(4)).

The Position of SBC

SBC objects to the inclusion of the language in Subsection 505(b)(5) in the Rule. It contends that this subsection either duplicates Subsection 505(b)(4), or, it improperly expands the requirements of subsection 505(b)(4). SBC argues that potential liability motivates good performance. Actual liability, on the other hand, should be significant only when performance failures are significant. Whether a Plan has sufficient potential for liability, SBC continues, is not the same inquiry as whether liability under a Plan would actually accrue at a meaningful and significant level when performance standards are significant. (SBC Initial Brief at 33).

The Position of Staff

Staff argues that the two subsections are not the same. Staff notes that the FCC has employed similar criteria in evaluating performance assurance plans pursuant to Section 271. (Staff Reply Brief at 23).

Commission Analysis and Conclusions

SBC's own arguments clarify the difference between two subsections. One asks for a determination as to potential liability, regardless of actual liability. Evidence as to potential liability concerns sufficient motivation on the part of the Level 1 carrier to provide service that is not substandard. The other subsection asks for a determination as to actual liability, which addresses an ILEC's actual performance, an issue that is separate from motivation for good performance. Because the two issues are not the same, we do not agree with SBC that subsection 505(b)(5) expands subsection 505(b)(4). We also do not agree with SBC that subsection 500(b)(5) should be deleted.

III. Issues Applicable to Level 1 and Level 2 Carriers

a) The Wireless Coalition's Revised Performance Measures and Remedies for Wholesale Service Access

The Rule requires Level 1 carriers to include wholesale special access services in their Wholesale Service Quality Plans. The Plans must have measures for the ordering, provisioning and repair of wholesale special access services. (*See* Appendix, Sec. 310).

The Position of the Wireless Coalition

The Wireless Coalition proposes its own extensive special access-related performance measures, standards and remedies for Level 1 and Level 2 carriers. (*See,* Wireless Initial Brief, Appendix A). The Coalition avers that its proposals are based on its members' experiences in the Illinois market, and their familiarity with technology. (Wireless Reply Brief at 14-16).

In its Brief on Exceptions, the Wireless Coalition argues that the performance measures it proposes should be adopted because several of those measures are currently being used by Level 1 carriers and the other measures are closely related to those measures that are currently used by Level 1 carriers. (Wireless Brief on Exceptions at 7-9). It maintains that incorporating these measures in the Rule will further the legislative purposes of encouraging competition and ensuring that end user consumers will receive quality service. The Wireless Coalitions avers, however, that while the Level 1 carriers have measures for wholesale service quality concerning wholesale special access services, those measures are not in Level 1 Wholesale Service Quality Plans. Thus, it opines that without enunciating specific performance measure now, it is unlikely that the Level 1 carriers' Plans will include and specifically define such measures and standards. (*Id* at 11).

Also In its Brief on Exceptions, the Wireless Coalition argues that, to be consistent with the definitions in Section 105, the word "maintenance" should be added to Section 310. (Wireless Brief on Exceptions, p. 6).

The Position of Staff

Staff opines that it has not had the opportunity to investigate the issues presented in the Wireless Coalition's proposed Rule; it therefore does not have sufficient information at this time to confirm each of the individual issues raised by the Wireless Coalition. Staff recognizes that this proceeding has provided significant evidence that issues regarding the service quality of wholesale special access services are not being resolved in a manner that supports competition, but it is of the opinion that the Rule, in its current form, is broad enough to address most <u>situations involved in provisioning</u> wholesale special access services.

Staff believes that the Coalition's issues are more appropriately raised in light of the differing systems, remedy plans and business rules of each of the Level 1 carriers. Staff notes that it will also have an opportunity to revisit the Wireless Coalition's issues regarding Level 1 carriers, when the Level 1 carriers file their respective Wholesale Service Quality Plans with the Commission.

Regarding Level 2 carriers, Staff opines that, at this time, the level of Wholesale Special Access requests of Level 2 carriers does not appear to be sufficient to justify establishing standards applicable to Level 2 carriers. Staff points out that the Wireless Coalition concedes that its members purchase approximately 95-100% of their intrastate, intraLATA, wholesale special access services from Level 1 carriers.

The Position of Citizens

Citizens maintains that the <u>language</u> ~~rule~~ proposed by the Wireless Coalition should not be adopted because has provided no explanation as to how it has formulated the measures it proffers. (Citizens Reply Brief at 10-11).

The Position of SBC

SBC argues that the remedies proposed by the Wireless Coalition in its proposed Rule are exorbitant. (SBC Initial Brief at 19). Citing specific Wireless evidence, it contends that there is no evidence to show that these proposals are feasible, practicable, necessary or preferable. (*Id.* at 17; *See also* Tr. 647-49; Wireless Ex. 1.0 at 10). It contends that the proper place to address the Wireless Coalition's desire for service quality is through the complaint process. (SBC Initial Brief at 21).

The Position of Verizon

Verizon avers that the Commission should not adopt the metrics proffered by the Wireless Coalition. Verizon posits that the Wireless Coalition did not provide testimony to support the metrics included in its proposal. (Verizon Reply Brief at 31).

Commission Analysis and Conclusions

We note that there was no evidence establishing that the standards and remedies proffered by the Wireless Carriers are reasonable. For example, the Rule proposed by the Wireless Carriers requires provision of a Firm Order Conformation no later than three business days from the date on which the requesting carrier orders a wholesale special access service. (Wireless Initial Brief, Ex. A, Sec. 310(b)). There is no evidence indicating that it is reasonable to require an ILEC to provide this type of Firm Order Confirmation within three business days. We also note that the testimony established that the wholesale special access circuits are highly specialized, that is, they are tailored to meet the needs of the requesting carrier, which is some indication that it takes time to provision such services.

We are concerned, as is Staff, that we will be imposing rules on carriers without adequate evidence that such rules are reasonable. And, while the Coalition contends that its measures are based on its experiences, those experiences are on the receiving end, not on the provisioning end. The two are not the same.

Moreover, Section 310 provides, in pertinent part:

> The services to be covered for a Level 1 carrier shall include, but not be limited to . . . wholesale special access services, and shall include wholesale special access measures for ordering, provisioning and repair.

(Appendix, Sec. 310). Thus, the Rule requires Level 1 carriers to develop measures and remedies for the ordering, provisioning and repair of wholesale special access services. There is no indication in this record that such development will not be fruitful. As for Level 2 carriers, as Staff points out, at this time, the amount of Wholesale Special Access requests of Level 2 carriers does not appear to be sufficient to justify establishing standards applicable to Level 2 carriers. We therefore decline to incorporate the Wireless Coalition's revised performance measures and remedies into the Rule.

We are not persuaded that the Wireless Coalition's measures should be adopted merely because some of the Coalition's proposed measures are already being used by SBC. Also, the Coalition's contention that other measures are closely related to measures SBC currently uses is, at best, too vague to form the basis for requiring carriers to adhere to these measures. Moreover, the Wireless Coalition did not present evidence at the evidentiary hearing establishing that these measures are feasible or reasonable.

We agree, however, with the Wireless Coalition that consistency should be maintained with the definitions in Section 105. Section 310 should be amended to provide:

> The services to be covered for a Level 1 carrier shall include, but not be limited to . . . wholesale special access services, and shall include wholesale special access measures for ordering, provisioning, **maintenance** and repair.

(Appendix, Sec. 310).

IV. Issues Applicable to Level 2 Carriers

Background

Currently, there are three Level 2 carriers in Illinois. Each of the three has approximately 100,000 access lines. The Level 2 carriers serve approximately 5% of Illinois' total access lines.

In general, when establishing the Level 2 standards, the associated remedies, and the relationship between the providing carrier and the requesting carrier, Staff "kept it simple." While many of the Level 1 performance standards can be measured in seconds, minutes, or hours, the Level 2 performance standards contained in Section 605 are measured in hours or days. (Staff Initial Brief at 52-56; Appendix, Sec. 605). The Rule also subjects Level 2 carriers to a minimal set of performance measures. They concern:

--unbundled local loops
--interconnection trunks
--resold local services
--collocation
--loss notification
--customer service records.

(*See,* Appendix, Sec. 605).

a) Section 605: Wholesale Service Quality Plans vs. the Rules for Level 2 Carriers

The Position of Staff

Staff sees the Rules for Level 2 carriers as a set of default regulations, to be imposed only when a Level 2 carrier does not negotiate its own performance with a CLEC~~s~~ and place those standards in an interconnection agreement. (Staff Reply Brief at 46-47; Appendix, Sec. 630).

However, the Rule for Level 2 carriers does not allow for the type of Wholesale Service Quality Plan that Level 1 carriers have. In Staff's opinion, the statistical analysis used in the Wholesale Service Quality Plans for Level 1 carriers is not appropriate for Level 2 carriers, who have a much lower volume of wholesale service that the Level 1 carriers. (*See,* Staff Ex. 10.0 at 17). Staff points out that Level 1 carriers have already made substantial investments in the automated operational support systems that are used to make the mathematical computations that are necessary for the statistical analysis used for Level 1 carriers in their Plans.

According to Staff, development of individual Level 2 Wholesale Service Quality Plans will require the investment of time and money by both the provisioning carrier submitting the Plan, and the requesting carriers that desire to comment on the Plan. (Staff Ex. 7.0 at 18-19). In Staff's opinion, allowing all Level 2 carriers the option of being treated as Level 1 carriers would force requesting carriers to comment on their plans and participate in ~~those~~ proceedings regarding Commission approval of the Plans, which places ~~thus placing~~ an unreasonable burden and expense on the requesting carriers, in particular, ~~particularly~~ the smaller CLECs who purchase service from ~~a~~ Level 2 carriers.

The Position of Citizens

Citizens, one of the three Level 2 carriers, does not desire the simplicity that the Rule would afford it. Rather, Citizens contends that the Commission should be able to defer establishing standards for a Level 2 carrier, if that carrier so desires, until company-specific Level 2 Wholesale Service Quality Plans can be filed, reviewed and approved by the Commission. Citizens avers that there has been no comparison, in this docket, between the burden placed on Level 2 carriers by Staff's proposed Rule and the burden imposed by a Wholesale Service Quality Plan. (Citizens Initial Brief at 33-34; 37). It points out that implicit in Staff's four-level approach to the Rule is an understanding that there cannot be a one-size-fits-all approach to wholesale providers. Citizens proposes that the Rule should include the following language:

> [e]very Level 2 carrier may file with the Commission for review and approval a Wholesale Service Quality Plan as specified in, and pursuant to, Subparts b, c, and d, of this Part. . . For any filing due after June 1, 2004, if a Level 2 carrier proposes to maintain, without any additions, deletions or modifications, its existing Wholesale Service Quality Plan, the Level 2 carrier may file, in lieu of filing a new Wholesale Service Quality Plan, a verified statement indicating that it proposes to maintain in effect, without any additions, deletions or modifications, its existing Wholesale Service Quality Plan . . .

Citizens' proposal provides for Commission review of a Level 2 Wholesale Service Quality Plan, which is similar to the procedures for Commission review of a Level 1 Wholesale Service Quality Plan. (Citizens Ex. 1.1, pp. 20-21). Citizens' proposal also includes the standards that must be included in such a Plan. (*Id*). Under Citizens' proposal, a Level 2 Carrier would not be required to have a Wholesale Service Quality Plan, but it could do so, if that company was so inclined. Moreover, an interested CLEC would not be obliged to participate in the Commission review proceeding. Citizens posits that the majority of time and expense involved in developing and litigating the Wholesale Service Quality Plan would not be borne by interested CLECs, rather, it would be borne by the Level 2 ILEC proffering the Plan.

The Position of the IRCA

The IRCA takes the position that development of company-specific Wholesale Service Quality Plans could take years, leaving CLECs without adequate minimum service standards in the meantime. It maintains that the Rule provides standards for only six performance measures and there is no evidence indicating that complying with these six measures would be unduly burdensome. (IRCA Initial Brief at 8; Reply at 18-20). The IRCA additionally points to Section 630 of the Rule, which provides:

Effect of Interconnection Agreement

> If a Level 2 carrier provides wholesale service to another carrier pursuant to an interconnection agreement, and those carriers have negotiated the interconnection agreement or an amendment to the interconnection agreement after the effective date of this Part that expressly references this Section and it amends any of the standards and requirements contained in this Subpart, those standards and requirements contained in this Subpart shall not apply to such carriers if, but only to the extent that it is so provided in the interconnection agreement or amendment, and provided further that the changes from or to the standards and requirements contained in this Subpart are not contrary to the public interest. . .

(Appendix, Sec. 630). The IRCA posits that this portion of the Rule allows a carrier to develop a Plan for the delivery of wholesale service, on an informal basis, that conforms to the requirements of the Rule, without the delay and expense involved in the formal procedure Citizens proffers for the development of a Wholesale Service Quality Plan. (IRCA Reply Brief at 20).

Commission Analysis and Conclusions

We agree with the IRCA that Section 630 of the Rule provides an informal mechanism, by which, a Level 2 carrier can develop company-specific measures and remedies in the same way a Wholesale Service Quality Plan would. Section 630 alleviates any need for a formal Level 2 Wholesale Service Quality Plan procedure. We concur, therefore, with Staff and the IRCA that there is no need for Citizens' procedure for the formal development of a Wholesale Service Quality Plan.

b) 100% Benchmarks

Background

The performance standards expected of Level 1 carriers, generally, provide for an assessment of what is an average monthly performance, based on parity with a retail customer, or with an affiliate, and then application of a statistical formula that allows for random error, which is approximately 5 %. The benchmarks that are used in Level 1 plans are generally also less than 100%. Therefore, use of these benchmarks ~~which~~ also allows for random error.

Thus, through the application of statistical formulae that allow for "random error," Level 1 carriers can provide service to a CLEC that is less than 100% of parity with an affiliate or retail customer, and still not have to incur any remedy.

With regard to the three Illinois Level 2 carriers, however, the Rule uses "hard benchmarks." Generally, performance that does not meet the "hard benchmarks" is substandard performance, subjecting a Level 2 carrier to incur a remedy, without any allowance for random error. In the event that a Level 2 ILEC provides service to a connecting carrier that fails to meet the standards established in Section 605, a credit is applied to the purchasing carrier's bill. (Appendix, Sec. 615; Staff Ex. 4.0 at 10).

The Position of Staff

Staff acknowledges that the goals of TA 96, which establishes parity as the basic standard for quality of service provided by ILECs to interconnecting carriers, can be achieved, if the wholesale service provided by an ILEC to an unaffiliated competitor is equal to the service the ILEC provides to its affiliates or to its retail customers. Implicit in this acknowledgement is a preference for parity of performance, which is better achieved with standards that have some "cushion" for random error, as opposed to hard benchmarks.

However, as a practical matter, Staff opines, it is an extremely complex endeavor to do parity calculations for small volumes of orders. Benchmark standards minimize the reliance on statistical testing when determining whether acceptable performance has been provided or achieved. (Staff Ex. 4.0 at 8). In Staff's opinion, statistical testing methods, such as parity testing or expressing standards as "a percentage within" a standard, could be administratively burdensome ~~on~~ for Level 2 carriers.

The testimony presented by Staff established that if statistical methods were used on the low volumes of services provided by Level 2 carriers, only small-sample techniques could be recommended for use. The "power" of small-sample techniques is problematic; therefore, the statistics achieved are less reliable when there are small samples. (*See, e.g.,* Staff Ex. 4.0 at 9).

Staff opines that the parity comparison used by the Level 1 carriers is not mathematically sound for use by Level 2 carriers. (Staff Reply Brief on Exceptions at 24). Dr. Patrick's testimony establishes, Staff continues, that large samples are needed to make statistically accurate parity comparisons. (Staff Reply Brief on Exceptions at 25).

Staff also points out that the existing Plans for Level 1 carriers currently contain some benchmark standards. Staff is of the opinion that benchmarks are more consistent

~~provide more consistency~~ with other Commission rules regulating service quality, such as Code Parts 730 and 732, which contain hard benchmark standards.

Staff disagrees with Citizens' contention that Section 13-712(g) did not empower the Commission to provide for remedies. Staff points to the broad language in Section 13-712(g), which, Staff avers, gave the Commission the express authority to establish remedies to ensure enforcement of the rules. The language in Section 13-712(g) also gave the Commission the implicit authority to do what is reasonably necessary to accomplish the legislature's objective. (*Id.* at 22)

The Position of Citizens

Citizens objects to Staff's proposed use of 100% benchmarks. Citizens points out that no evidence was presented as to how much a Level 2 carrier would be required to pay, if 100% benchmarks were imposed. Citizens additionally points out that Level 1 carriers are currently allowed a little "leeway," (or a "cushion") through the use of statistical analysis, which is not afforded through use of "hard benchmarks." (Citizens Initial Brief at 22-24). Citizens further posits that it is technically impossible for any carrier to comply with every provision or report order on time, every time. (*Id.* at 25).

Citizens additionally maintains that SBC's and Verizon's Plans are based on parity with their retail performance, not 100% benchmarks. Thus, Citizens reasons that requiring Level 2 carriers to achieve 100% compliance with wholesale standards is arbitrary. (Citizens Brief on Exceptions at 15).

Citizens proposes that, instead of a 100% benchmark, the Rule should have ~~to use~~ 90% standards for all provisioning benchmarks and 95% standards for all repair benchmarks. (*Id.* at 27-28). Citizens points to 220 ILCS 5/13-712(g), which requires that standards be set and remedies be established to "ensure enforcement of the rules." ~~Citizens believes that A~~nything beyond such enforcement just provides a windfall to a CLEC. (*Id.* at 14). Citizens further contends that, pursuant to 220 ILCS 5/13-712(d)(4), CLECs are already reimbursed by ILECs when a violation of a service quality standard is caused by a wholesale carrier. Thus, Citizens is of the opinion that a wholesale customer should not be afforded any additional compensation. (*Id.* at 26).

On Exceptions, Citizens cites Section 13-712(d) of the Act, which allows for the imposition of fines, penalties and other enforcement mechanisms for retail service standards. Because Section 712(g) does not contain the same language, Citizens concludes that when the Rule requires payments or credits, it exceeds the authority conferred on the Commission by the General Assembly. (220 ILCS 5/13-712(d); 712(g)). (Citizens Brief on Exceptions at 11-12).

The Position of AT&T

AT&T also supports a 95% benchmark for Level 2 carriers. (AT&T Initial Brief at 12).

The Position of the IRCA

The IRCA argues that a 100% standard is necessary so that CLECs are assured that Level 2 carriers meet the standards in the Rule. (IRCA Initial Brief at 12). The IRCA also posits that it is far from clear how the percentages proposed by Citizens would be applied. (IRCA Reply Brief at 16-17). According to the IRCA, Citizens has not identified or explained how 90% or 95% performance would be calculated, which is unlike the situation for a Level 1 carrier with a Wholesale Service Quality Plan. (IRCA Reply Brief on Exceptions at 8).

The IRCA also points out that while Citizens maintains that it should have parity with Level 1 carriers on this issue, in fact, Level 1 carriers are subject to countless performance measures. The Rule does not subject Level 2 carriers to the volume of measures to which Level 1 carriers are exposed in their Wholesale Service Quality Plans. Thus, the IRCA reasons that subjecting Level 2 carriers to 90% or 95% performance measures does not really place a Level 2 carrier in a similar position to that of a Level 1 carrier.

Commission Analysis and Conclusions

We note at the outset that Citizens is the only one of the three Level 2 carriers to contest the Level 2 benchmarks. We also note that the evidence establishes ~~indicates~~ that currently, Level 2 carriers do not provide much in the way of wholesale service and the evidence also indicates that there is little customer dissatisfaction with the wholesale services that Citizens does provide. (Citizens Ex. 2.0 at 36). These two facts are some indicia that Citizens will not be burdened by the standards that Staff seeks to impose on it. Finally, we note that the measures and remedies in the Rule are conservative in nature.

However, Citizens' proposal to use a 90% standard for provisioning benchmarks and a 95% standard for repair benchmarks is not without some merit. Currently, many of the measures in Level 1 Plans are not assessed at 100% of the benchmark, thus affording such ILECs a "cushion" for random error. The problem is that, for Level 2 carriers, the volume of transactions is low. According to the undisputed testimony of Dr. Patrick, random error occurs in large samples. Thus, for the low volume of transactions that Level 2 carriers currently experience, it is not mathematically sound to assess performance at 90% or 95%. (Staff Ex. 4.0 at 9). Also, as the IRCA points out, it would be difficult to determine how to apply the percentages Citizens seeks to impose, which, undoubtedly, will lead to Level 2-CLEC disputes.

Furthermore, it is true that currently, there are mechanisms, by which, a CLEC is reimbursed when the substandard local exchange service it provides is due to ILEC error. However, faulty provisioning results in losses of customers, losses of good will, and the like, for which, the CLEC is not reimbursed. (*See,* 220 ILLCLS 5/13-712(d)(4)). Therefore, we decline to presume, as Citizens suggests, that the statutory remedies in Section 712(d)(4) of the Act ~~for substandard service~~ will make a CLEC whole. We therefore decline to adopt Citizens' 90% and 95% benchmarks.

We are also not persuaded by Citizens' contention that Section 712(g) did not confer upon this Commission the authority to impose credits or payments. We are empowered with the authority to "[e]stablish remedies to ensure enforcement of the rules." (220 ILCS 5/13-712(g)). A remedy is the means by which the violation of a right is prevented, redressed or compensated. (Black's Law Dictionary (5th ed. 1979) at 1163). Necessarily, a financial consequence, such as the credits or payments here, fits within this definition. (*Buckner v. Causey,* 311 Ill. App. 3d 139, 148-150 (1st Dist. 1999)).

c) Thresholds

The Position of Citizens

The evidence established that, although Citizens is the third-largest ILEC in Illinois, its volume of wholesale collocation orders, unbundled loops, resold local services and other wholesale services is minimal. Citizens argues that therefore, the Rule should include a threshold of wholesale activity for Level 2 carriers in order to give those carriers an opportunity to "gear up" and dedicate resources necessary to meet the Part 731 standards. Citizens suggests the following thresholds:

Unbundled Local Loops: 25 orders per (calendar) quarter
Interconnection Trunks: 10 orders per (calendar) quarter
Resold Local Services: 25 orders per (calendar) quarter

The Position of Staff

Staff contends that Citizens' proposed thresholds are unduly complicated and they would create unnecessary confusion, with ~~for~~ very little benefit. (Staff Reply Brief at 51-52).

The Position of the IRCA

The IRCA contends that the Commission should not adopt Citizens' proposed thresholds. (*See, e.g.,* IRCA Reply Brief at 16-20). The IRCA also avers that the thresholds posed by Citizens can result in "on-again off-again" performance standards. (*Id.* at 12-13).

Commission Analysis and Conclusions

We agree with Staff and the IRCA that Citizens' proposed thresholds are subject to varying interpretations, thus leading to the potential for unnecessary disputes between a

Level 2 ILEC and a CLEC. For example, it is not clear whether a threshold would apply during the month with the threshold activity, whether it would include the particular CLEC in question, and whether it would continue, or stop, in the months following the threshold activity, if the Level 2 carrier did not meet the threshold in those months. Therefore, we decline to adopt Citizens' proposal on this issue.

d) Caps on the Amount of Remedies

The Position of Citizens

Citizens proposes a "cap" on the amount a Level 2 carrier would have to credit a CLEC, equal to 10 times the monthly recurring charge for the service in question. (Citizens Initial Brief at 9).

The Position of Staff

Staff opposes any cap on Level 2 remedies. Staff opines that caps can impede competition, as they allow an ILEC the opportunity to calculate the amount of misses that will result in the maximum possible remedy and then determine whether it is worthwhile to engage in anti-competitive behavior, *i.e.,* deliberately provide a CLEC, or CLECs with substandard service in an effort to force a CLEC, or CLECs out of business. (Staff Reply Brief at 56).

The Position of the IRCA

The IRCA objects to Citizens' proposed ~~the~~ use of caps. According to the IRCA, a cap on the amount of remedies provides a disincentive for a Level 2 carrier to meet the standards for all carriers. The IRCA shares Staff's opinion that caps can be manipulated for anti-competitive purposes. (IRCA Initial Brief at 12-13,16).

Commission Analysis and Conclusions

We agree with Staff and the IRCA that the imposition of caps on penalties can provide an incentive for an anti-competitive assessment of the maximum cap, in an effort to drive a CLEC or CLECs out of business. Therefore, we are not inclined to impose ~~a~~ caps on remedies.

e) The Exclusions in Section 610(f) for Wholesale Customer Error

The Position of Citizens

The Rule provides for seven fact-specific situations in which a Level 2 carrier is excused from meeting the applicable standards. These situations ~~exclusions~~ are consistent with the exclusions in 220 ILCS 5/13-712(e)(6), which concerns when credits for substandard retail services are imposed. For example, if a Level 2 carrier is unable to provision an Unbundled Loop in five days as a result of a wholesale customer missing an appointment, the Level 2 carrier in question would not be subject to paying or crediting any remedies. (*See,* Appendix, Sec. 610(f)).

Citizens contends that the exclusions proposed by Staff only focus on situations in which the wholesale carrier (the ordering carrier) causes the substandard performance. Citizens posits that a Level 2 carrier should not be deemed to violate the standards if the substandard performance is caused by the end user retail customer, whether it is due to a willful action, or, due to malfunctioning equipment owned or operated by the end user customer. (Citizens Initial Brief at 30). Accordingly, Citizens proposes that the Rule include the following additional language in Part 610(f):

> The standard set forth in this Subpart will not be considered to be violated for the period of delay if such delay is due to the following:
>
> 1) as a result of the negligent or willful act on the part of the wholesale customer <u>or the end user retail customer</u>;
>
> 2) as a result of a malfunction of equipment owned or operated by the wholesale customer <u>or the end user retail customer; . . .</u>

The Position of Staff

Staff agrees with Citizens that the proposed language should be added.

Commission Analysis and Conclusions

We agree with Citizens and Staff that the above-cited language should be incorporated in the Rule. The Rule will be amended to reflect that language. (*See,* Appendix, Sec. 610(f)).

f) Section 610: Citizens' Contention that the Requisites for Loss Notification and CSRs are Vague

The Position of Citizens

Citizens argues that it is unable to comply with the standards in the Rule. Citizens also objects to the requirement that loss notification and CSRs <u>(Customer Service Records)</u> must be provided within 24 hours. It maintains that the standards, as written, are vague, as they do not specify what events trigger the 24-hour periods for compliance. Absent further clarification in the Rule, Citizens maintains that CLECs could interpret the Rule in different ways, thus leaving the possibility of future disputes. (Citizens Initial Brief at 15-16). Citizens also finds the proposed definition of Customer Service Records to be incomplete, as, according to Citizens, that definition does not mention billing and credit information or non-regulated services. (*Id.* at 8-9; 17).

The Position of the IRCA

The IRCA finds Staff's Rule, as proposed, to be unambiguous. (IRCA Reply Brief at 11-12). In response to Citizens' contention that it should not be required to meet most of the standards in the Rule, the IRCA points out that the sole basis for Citizens' assertion that it should not be subject to the requirements mentioned above is the following testimony:

> Q: Does CTC-Illinois believe it can meet the wholesale service performance measures and standards proposed by Staff?
>
> A: No.

(Citizens Ex. 2.0, lines 722-24). The IRCA contends that this factually unsupported conclusion should not be considered by the Commission.

The Position of Gallatin River

Gallatin River is one of the three Illinois Level 2 CLECs. Gallatin River finds the Level 2 Rules to be acceptable, in their totality. (Gallatin River Initial Brief at 1-2).

Commission Analysis and Conclusions

We agree with the IRCA that the testimony, upon which, Citizens bases its conclusion that it should not be required to meet the performance standards is too vague to establish the proposition that the performance standards should not be adopted. Lacking from this testimony is an explanation as to why or how the standards cannot be met. We cannot consider such factually unsupported conclusions. (*Statler,* 167 Ill. App. 3d at 410-11). Even if we were to consider ~~such~~ Citizens' conclusions, there is no evidence that the minimum service obligations for Level 2 carriers are unduly burdensome. Citizens is one of the three Level 2 carriers and it is the only Level 2 carrier that objects to the standards imposed by the Rule. Therefore, we are not persuaded by Citizens' general contention that it cannot meet the standards imposed on Level 2 carriers by the Rule.

Loss Notification

The Rule currently provides that Level 2 carriers shall provide Loss Notification within 24 hours, without defining when that 24-hour period commences. (*See,* Appendix, Sec. 610(d)). However, it is clear from the testimony provided that the parties intended to require notification within 24 hours following receipt of the information triggering a Loss Notification, *i.e.,* information that a customer has decided to switch its service. Therefore, to address Citizens' argument that the Rule is vague, we conclude that the portion of Section 610(d) regarding Loss Notification should be changed to read as follows:

d) Loss Notifications- upon receipt of information that a customer has switched carriers, the customer's new Level 2 carrier shall provide Loss Notification within the following timeframes: ~~Level 2 carriers shall provide Loss Notifications within the following timeframes~~:

1) UNE-Platform	-within 24 hours
2) Resale	-within 24 hours

(*See,* Appendix, Sec. 610(d)).

CSRs

Currently, the Rule provides that CSRs must be provided to the "carrier requesting the CSR" within 24 hours. (*See,* Appendix, Sec. 731.610(e)). It is evident, from this language, that the "triggering event" for a CSR is the request for a CSR. So that it is abundantly clear, we shall change the Rule to read as follows:

e) Customer Service Record – Level 2 carriers shall provide CSRs to the carrier requesting the CSR within 24 hours from the receipt of that request.

(See, Appendix, Sec. 610(e)).

However, the definition of a CSR is the following:

> account information that a providing carrier maintains about an end user and includes, but is not limited to the billing name, service address and billing address of the end user. . . .

(Appendix, Sec. 105). Contrary to Citizens' assertion, the Rule is not ambiguous regarding end user billing information. Moreover, since the Rule does not mention non-regulated services, it is clear that none are required to appear on a CSR. Therefore, Citizens' remaining arguments regarding CSRs are without merit.

g) Sections 605 and 610 (Renumbered as Sections 610 and 615): Collocation

Background

Collocation is the process by which one carrier places its network equipment at the premises of another carrier. Provisioning collocation concerns matters that are often unique to each individual transaction, as the network equipment to be placed can vary from situation to situation. Also, common sense dictates that matters such as a provisioning carrier's amount of available space, accessibility and other like issues can make provisioning collocation a complex endeavor.

The Position of Staff

Staff is of the opinion that the Rule should include Level 2 measures for collocation. Citing TA96, Staff contends that state commissions may impose quality standards on carriers in addition to those imposed by the FCC. Staff further points out that the Rule allows for more time than applicable FCC standards for Level 2 carriers to complete orders for ~~with respect to~~ virtual collocation.~~, a Level 2 carrier would have more time under the Rule that pursuant to FCC standards~~. (Staff Reply at 47-48; 47 U.S.C. Secs. 253(b) and (e)(2)).

Staff objects to the language included in the ALJPO which further defines the time period for providing collocation. This language was added to address Citizens' "Hobson's choice" argument concerning being forced to choose between not proceeding with collocation or proceeding without an affirmative response from a requesting carrier. (Staff Brief on Exceptions at 21-22). Staff reasons that because a Level 2 carrier can provide for this type of situation in an interconnection agreement, there is no need to safeguard against the "Hobson's Choice" situation Citizens has described. (Staff Reply Brief on Exceptions at 21).

According to Staff, the 90-day period for provisioning collocation should not commence when a provisioning carrier receives a response from the requesting carrier setting forth the terms of collocation. Staff reasons that, in such a situation, a Level 2 provisioning carrier could delay the process by "sitting on" the original request before sending collocation terms to the requesting carrier. Staff points out that the Rule requires requesting carriers to provide complete and accurate information, receipt of which, in Staff's opinion, should start the 90-day clock set forth in the Rule. (*Id.* at 20-21).

The Position of the IRCA

The IRCA argues ~~contends~~ that the Rule is plain and unambiguous. The IRCA posits that the Rule does not require ILECS to repair the facilities of a CLEC. (IRCA Reply Brief at 14). The IRCA, too, objects to the language added in the ALJPO that commences the 90-day collocation period from when a Level 2 ILEC receives a response from the requesting carrier as to the terms of collocation. (IRCA Reply Brief on Exceptions at 3-4).

The Position of Citizens

Citizens contends that Level 2 carriers should not be subject to the standards set forth in the rule relating to collocation, such as firm order confirmations, and provisioning and repair standards for collocation. Citizens maintains that Sections 610 and 615 are inconsistent with the collocation standards and requirements established by the FCC, as

Sections 610 and 615 do ~~Staff's proposal does~~ not refer to collocation standards established by the ILEC. The FCC standards provide:

> Within ten days after receiving an application for physical Collation an incumbent LEC must inform the requesting carrier whether the application meets each of the incumbent LEC's established collocation standards.

(47 C.F.R. Sec. 51.323(l)(1)).

Those standards further provide:

> Except as stated in paragraphs (l)(3) and (l)(4) of this section an incumbent LEC must complete provisioning of a requested physical collocation arrangement within 90 days after receiving an application that meets the incumbent LEC's established collocation application standards.

(47 C.F.R. Secs. 51.323(l)(2)). Citizens points to Sections 51.323(l)(3) and (l)(4) of the federal regulations, which provide exceptions to the 90-day provisioning standard, based upon whether the ILEC has timely received an affirmative notification to proceed from the CLEC after the CLEC has received a price quotation for collocation. (47 C.F.R. Secs. 51.323(l)(3) and (l)(4); Citizens Initial Brief at 12-14).

Thus, Citizens argues that Section 610(b) requires a Level 2 carrier to complete the provisioning requirements for collocation, regardless of whether that CLEC has affirmatively responded to a price quote for collocation. Citizens contends that the proposed Rule, therefore, could require Level 2 carriers to make a "Hobson's choice," that is, the Level 2 carrier could be forced to choose between a) not proceeding with collocation following delivery of a price quote and therefore risk being subject to the remedies imposed by the Rule, or b) proceed with collocation to meet the 90-day provisioning deadline without an affirmative response to a price quote, and risk not being paid by the requesting CLEC for collocation.

Citizens also contends that the proposed repair and maintenance standards for collocation are ambiguous and incomplete. It points out that, for virtual collocation, the ILEC supplies the equipment, however, for physical collocation, the CLEC supplies the equipment. Yet, the Rule, as proposed by Staff, does not differentiate as to whose equipment must be repaired. (Citizens Initial Brief at 13-14). Citizens also opines that the proposed Rule for completing repairs conflicts with federal laws because the Rule gives Level 2 carriers more time to complete repairs than is required by FCC standards. (*Id.* at 15).

Citizens avers that collocation arrangements vary considerably, depending upon the type of collocation requested and the equipment to be collocated. Also, a provisioning carrier may have logistical issues, such as space, or interconnection/entrance facility issues. Unlike other wholesale services, collocation requests tend to be unique, asserts Citizens. Unique circumstances require an ILEC to investigate the feasibility of a request and they require the exchange of information between the carriers. (Citizens Reply Brief on Exceptions at 7).

Commission Analysis and Conclusions

Citizens' argument that the Rule conflicts with FCC regulations requiring collocation within 90 days following the receipt of an applications that meets the ILEC's collocation standards ignores Section 610(b)(2), which provides that provisioning intervals will not apply, if a Level 2 carrier demonstrates that the request is not technically feasible and/or that the requested facilities are not available. (Appendix, Sec. 610(b)). We agree with the IRCA, furthermore, that the Rule clearly does not require an ILEC to repair CLEC-owned collocated facilities.

~~However, with regard to the "Hobson's choice" argument Citizens makes (concerning choosing between not proceeding with collocation or proceeding with the order without an affirmative response from the requesting carrier, only to risk not being paid), we conclude that Section 610(b) of the Rule should be amended to read as follows:~~

Staff contends that the 90-day clock should commence when a requesting carrier places a complete order for collocation. However, as Citizens points out, every collocation is unique to both the specific needs of the requesting carrier and to the physical and other limitations of the provisioning carrier. The better approach is to allow the 90-day clock to commence when both parties have a clear understanding as to what is involved. Starting the 90-day clock at this point in time also ensures that the transaction complies with 47 C.F.R. Sec. 51.323(l)(1), as it helps ensure that the clock will commence after the requesting carrier has notice of the ILEC's collocation standards.

We conclude, therefore, that the 90-day clock should commence upon receipt of a written response from a requesting carrier, not when the initial collocation order is made. Therefore, Section 610(b) will be amended to provide:

4) Collocation - Collocation - within 90 business days from a provisioning carrier's receipt of an affirmative written response from the requesting carrier as to the terms of collocation.

(*See,* Appendix, Sec. 610(b)).

h) Section 605 (Renumbered as 610): Provisioning Unbundled Local Loops with Advanced Services

The Position of Citizens

Citizens objects to Section 610, as it requires Citizens to ~~being required to~~ condition and provision Unbundled Local Loops for advanced services within eight days~~, which is a requirement in Section 610~~. Citizens points out that the evidence established that its wholesale customers have not had any problems with being provisioned such loops. Also, within the last 18 months, it has not received a request for such services. (Citizens Initial Brief at 18). Also, Citizens claims that it is simply not able to provide unbundled loops used for advanced services within eight days, as, according to Citizens, conditioning loops for advanced services in rural areas can take a considerable amount of travel time. (*Id.* at 19).

Citizens contends that advanced services are not mentioned in the service requirements set forth in 220 ILCS 5/13-712, or in the order initiating this docket; thus, it concludes that advanced services are outside the scope of this proceeding. It also argues that including advanced services in what is required of an ILEC to provision is discriminatory, as there is no ~~the statute does not contain~~ requirement~~s~~ for CLECs to provision or repair loops used for DSL or other advanced services. (Citizens Reply Brief at 9).

Citizens seeks to have the proposed performance standards for Level 2 carriers apply only to "analog" local loops provisioned for basic local exchange services ~~in Section 105~~. Citizens also seeks to have the word "advanced services" deleted from Section 610(b). (Citizens Initial Brief at 20).

Citizens also points to the fact that the FCC has announced plans to cease requiring HPFL (an advanced service) to be offered as a UNE. Also, the Commission has eliminated HPFL from its list of elements in Part 790 that ILECs must provide to CLECs. It reasons that therefore, reference to HPFL in the Rule should be stricken, as well as the definition of HPFL in Section 105. (Citizens Brief on Exceptions at 3).

To address Citizens' concern about its ability to timely provide the services in question, the ALJPO increased the time period in the Rule for provisioning loops that much be conditioned for advanced services from eight to 14 days. On Exceptions, Citizens argues, essentially, that Level 2 carriers should not be required to provide these services within any set timeframe. Citizens avers that conditioning or deconditioning a loop can be a complex process; the time it takes to complete such services depends on a number of factors. (Citizens Brief on Exceptions at 6)). It opines that Level 2 carriers should be able to provision HPFL on a case-by-case basis. In this way, the parties can agree as to how much time would be required, depending on the nature and complexity of the conditioning work to be performed. And, if provisioning or conditioning such a loop is not accomplished during the agreed-upon timeframe, then, the Level 2 carrier would be subject to the remedies in Section 605. (Citizens Reply Brief on Exceptions at 5).

In response to the ALJ's order of August 27, 2003, (Hereinafter, the "*TRO Briefing Order*") asking the parties to file briefs stating what impact, if any, the FCC's *Triennial Review Order* has on the issues at bar, Citizens seeks to eliminate line-conditioning requirements and standards. Citizens also seeks to eliminate reference to HPFL in the definition of "Local Loop" in Section 105 of the Rule. Citizens reasons that because the FCC will no longer require ILECs to provision HPFL, there is no reason to have standards regarding provisioning of HPFL in the Rule. (Citizens Reply Brief in Response to the *TRO Briefing Order* at 2-3).

The Position of Staff

Staff argues that the standards for Unbundled Loop Return should remain in the Rule. Staff points out that it has received many, many complaints from consumers who are not experiencing a smooth transition upon the transfer from one local exchange carrier to another when those consumers switch carriers. (*See,* Appendix, Sec. 105; Staff Ex. 5.0 at 4). ~~Staff makes no argument concerning unbundled local loops for advanced services.~~

Staff points out that it and the other participants in the collaborative workshops, including the other Level 2 carriers and the IRCA, determined that eight days was a sufficient amount of time to condition any loop, regardless of the location of that loop. Only Citizens has objected to the eight-day timeframe ~~measure~~. (*Id.* at 19).

Staff disagrees with Citizens' contention that 14 days is not sufficient time to condition a loop for advanced services. Staff points to the testimony of Citizens' witness, Kim Harber, which, Staff avers, established that conditioning a loop is usually not a complicated process. (Staff Reply Brief on Exceptions at 19; Citizens Ex. 1.0 at 19).

In response to arguments made by Citizens on Exceptions, Staff maintains that the Commission's decision to remove HPFL from the list of elements that ILECs must provide to CLECs has no impact on this docket, as the Commission removed the *entire* list of elements from Part 790 in the Part 790 Rulemaking. (Staff Reply Brief on Exceptions at 14-16). Staff points out that Section 790.320(b) provides that the elements or UNEs that the FCC determines ILECs must provide are the minimum elements that Illinois ILECs must provide to CLECs. (*Id.* at 16). Staff concludes that therefore, removal of HPFL from Part 790's list of elements is irrelevant.

In Response to the *TRO Briefing Order,* Staff opined that the *Triennial Review Order* has no impact on the Rule.[8] Staff reasoned that the Rule concerns how provisioning

[8] The IRCA, SBC, and Verizon also are of the opinion that the *Triennial Review Order* has no impact on the (continued…)

must occur if an ILEC provisions HPFL. The Rule does not require ILECs to provision any element. On the other hand, Staff continued, the FCC, in its *Triennial Review Order*, identified the UNEs and the circumstances under which an ILEC must make those UNEs available to a requesting CLEC. (Staff Brief in Response to TRO Briefing Order, p. 3).

Staff contends that including language in the Rule qualifying that it only applies when a carrier is obligated to provide HPFL on an unbundled basis could lead to confusion. According to Staff, the Rule could then be interpreted to imply that other provisions do impose requirements to provide certain network elements. (*Id.* at 6).

The Position of AT&T/WorldCom

AT&T/WorldCom disagree with Citizens' argument that HPFL should not be included in the Rule. They point out that the wholesale services provided from one carrier to another are a broad range of services that allow CLECS to provide telecommunications services to end user consumers. They reason that Part 731 governs the wholesale services provided by ILECs to CLECs, and not the resultant retail services CLECs offer to end users.

The Position of the IRCA

The IRCA posits that the General Assembly's omission of the term "basic local exchange services" from Section 712(g), the enabling statute, evinces the General Assembly's ~~its~~ intention to adopt wholesale service quality standards for more than just loops to provide basic local exchange services. Because ILECs are already required by the Act to provide wholesale services beyond basic local exchange services, the IRCA contends ~~posits~~ that the Commission should adopt rules governing those items that are provisioned on a wholesale basis that exceed basic local exchange services. Thus, the IRCA reasons that the Commission should reject Citizens' proposal. (IRCA Reply Brief at 10-11; 220 ILCS 5/13-801(d)(5)).

On Exceptions, the IRCA points out that Gallatin River, another Level 2 carrier, did not object to Staff's recommended eight-day time period for conditioning loops. In fact, this timeframe was originally proposed by a Level 2 carrier. (Tr. 515; IRCA Reply Brief on Exceptions at 2)

The IRCA opposes Citizens' proposal to determine this time period on a case-by-case basis, as Citizens' proposal does not impose any restrictions on when such loops must be provided. According to the IRCA, the General Assembly has already declared it to

(continued from previous page)
Rule.

be the policy in this State to require line sharing and HPFL as a network element. (*See,* 220 ILCS 5/13-801) .

The Position of McLeod

McLeod posits, in its Brief in Response to the *TRO Briefing Order*, that "it may be appropriate" to add language to Section 610(b)(4) clarifying that the provisioning requirements regarding HPFL are only in effect if a carrier is obligated to provide HPFL on an unbundled basis. (McLeod Brief in Response to *TRO Briefing Order* at 6-8).

Commission Analysis and Conclusions

It appears, from a review of the record and the proposed Rule, that the media for provisioning basic local exchange services and advanced services are inextricably intertwined. Based on the record before us, it does not appear practicable to segregate advanced services, as both advanced services and basic local services may be carried over the same media, the local loop. There is a need to regulate services performed on the local loop, which is a vital portion of the telecommunications path. We therefore decline to adopt Citizens' proposal to exclude advanced service from the Rule ~~in all situations, as the loop may have included those services before it needs to be conditioned, or after, it has been so conditioned, or, as a part of a group of services that includes basic telephone services and advanced services.~~.

~~However, to address Citizens' contention that its employees must physically alter local loops in rural areas, thus requiring a considerable amount of travel, the Rule will be modified to provide that such conditioning much take place within 14 business days from receipt of an accurate and complete service request. (*See,* Appendix, Sec. 610(b)(4)).~~

As was explained in the section of this Order discussing application of Section 712 to wholesale special access services, the scope of this docket is not limited to "basic local exchange services." (*See,* Sec. II(g)(2) herein). And, as was discussed in the Section of this Order addressing Level 1 Wholesale Service Quality Plans, the record demonstrates a legitimate need for making different requirements for ~~of~~ different carriers. (Sec. II(a) herein). Including advanced services in the Rule does not exceed the scope of this docket and requiring Level 2 carriers, who are ILECs, to provide such services, when CLECs are not so required, does not violate the equal protection clauses of the Illinois and United States constitutions. (*Stroger,* 201 Ill.2d at 252).

We conclude that the best approach is to use Staff's eight-day time period, but, to use it as a default, when the parties have not agreed to another period of time. In this way, a Level 2 carrier's special needs can be addressed, as well as any special situations the requesting carrier might have, through the negotiation process.

Also, as Staff points out, the Rule addresses how provisioning must occur. It does not require carriers to provision elements. Thus, the FCC's *Triennial Review Order* has no impact on the Rule. And, while Allegiance maintains that language clarifying that provisioning requirements regarding HPFL are only in effect if a carrier is obligated to provide HPFL on an unbundled basis, Staff correctly points out that inclusion of that language in one Section and exclusion of that language in another Section of the Rule could be construed as meaning that other provisions in the Rule *require* carriers to provide certain network elements. We agree with Staff that Allegiance' clarifying language is not necessary and it could lead to confusion. Section 610(b)(4) shall be amended to provide:

> 4) Except where otherwise agreed to, in writing, by the parties, w~~W~~hen a loop must be conditioned to remove bridge taps and load coils in order to provide a digitally capable loop or HFPL, the providing carrier must provide the conditioned (digitally capable) loop or HFPL within 8 ~~14~~ business days after receipt of an accurate and complete service request rather than within 5 business days as set forth in subsection (b)(1). However, provisioning intervals do not apply to digitally capable loops and HFPL when conditioning of the loop to meet the request would result in a significant degradation of the voiceband service that the Level 2 carrier is providing over that same loop.

i) Whether Section 630 Conflicts with TA96

Section 630 provides, in pertinent part:

> Effect of Interconnection Agreement
>
> If a Level 2 carrier provides wholesale service to another carrier pursuant to an interconnection agreement, and those carriers have negotiated the interconnection agreement or an amendment to the interconnection agreement after the effective date of this Part that expressly references this Section and it amends any of the standards and requirements contained in this Subpart, those standards and requirements contained in this Subpart shall not apply to such carriers if, but only to the extent that it is so provided in the interconnection agreement or amendment, and provided further that the changes from or to the standards and requirements contained in this Subpart are not contrary to the public interest. The standards and measures in this Subpart shall apply to: negotiated agreements or amendments to interconnection agreements effective after the effective date of this Part; negotiated interconnection agreements that do not expressly reference this Section; and negotiated agreements that do not

> expressly amend any of the standards and requirements contained in this Subpart.

(Appendix, Sec. 630).

The Position of Citizens

In its Brief on Exceptions, Citizens maintains that the language in Section 630 fails to take the terms in existing interconnection agreements into account. According to Citizens, the Rule will improperly "trump" those terms and conditions that are in existing interconnection agreements, in conflict with 47 U.S.C. Secs. 251 and 252. In support, Citizens cites *Verizon North Inc., v. Strand*, 309 F.3d 935, 940-43 (6^{th} Cir. 2002)). Citizens seeks to amend Section 630 so that it will provide:

> The standards and measures in this Subpart shall apply to: negotiated agreements or amendments to interconnection agreements effective after the effective date of this Part.

(Citizens Brief on Exceptions at 10-11).

The Position of Staff

Staff cites 47 U.S.C. Secs. 253(b) and 261(b) and (c), which allow state commissions to impose requirements to ensure the continued quality of telecommunications services, safeguard the rights of consumers or benefit local competition. Staff additionally points out that there is a standard change of law provision in interconnection agreements, which allows parties to those agreements to incorporate new legal standards, as need be. (Staff Brief on Exceptions at 21).

The Position of the IRCA

The IRCA opposes Citizens' proposed modification of Section 630. According to the IRCA, CLECs without performance measures in place need the Rule to ensure that the end user consumers do not receive substandard service. (IRCA Reply Brief on Exceptions at 7).

Commission Analysis and Conclusions

We disagree with Citizens' argument that Section 630 conflicts with TA96. In *Verizon North v. Strand,* 309 F.3d 935, 940-43 (6^{th} Cir. 2002), the Court ruled that state law was preempted by TA96, if that state law interferes with the methods by which TA96 was designed to reach its goal. In that case, the Michigan Public Service Commission (the "MPSC") ordered an ILEC to tariff its services and elements. This tariff allowed CLECs to bypass the negotiation/arbitration process set forth in TA96. The Sixth Circuit concluded that by requiring the ILEC to file public tariffs offering network elements to any party, the

MPSC's order improperly permitted market entrants to purchase network elements and finished services from a set menu without ever entering into the negotiation/arbitration process required by TA96. The court further determined that such tariffing effectively eliminated any incentive to engage in private negotiation, which is the centerpiece of TA96. Thus, the Court concluded that the tariff requirement in the MPSC's order was inconsistent with, and preempted by, TA96. (*Verizon North,* 309 F.3d at 940, 944).

Applying the reasoning from *Verizon North* here, Section 630 cannot allow parties to circumvent the negotiation/arbitration process. Section 630 does not circumvent the interconnection/arbitration process set forth in TA96. Pursuant to Section 630, carriers are free to modify their interconnection agreements to reflect standards other than those set forth in the Rule, as long as those standards are not contrary to the public interest. Nothing in Section 630 suggests that carriers can, or should, circumvent the interconnection agreement process. (*See, e.g., Michigan Bell Telephone Co v. MCIMetroAccess Transmission Services,* 323 F.3d 348, 361 (6th Cir 2003)).

In fact, the language in Section 630 reminds carriers that the interconnection agreement process is a viable, available tool. Thus, Section 630 encourages the use of the interconnection agreement process. We decline to amend Section 630 in accordance with Citizens' proposal.

j.) Section 635: Application of Level 1 Requirements to Level 2 Carriers and Conversion

The Position of Staff

The ALJPO added the first paragraph in Section 635, which required a Level 2 carrier to petition the Commission for a determination as to whether it should be required to comply with Level 1 requirements whenever that carrier was asked or required to provide Level 1 wholesale services. (*See,* ALJPO, Ex. A at 610). Staff objects to this language, as it contends that Section 635 was intended to allow the Commission to apply some or all of the Level 1 requirements, if the need arises, to Level 2 carriers. Staff avers that Section 635 is a means, through which, the Commission can adjust the wholesale service quality requirements for a Level 2 carrier, if competitive conditions or needs change. (Staff Brief on Exceptions at 23-24).

Commission Analysis and Conclusions

Staff desires to keep Section 635 flexible. Staff opines that the Rule will be more flexible if a Level 2 carrier is not required to petition for a determination as to whether it should be required to comply with Level 1 requirements when it is asked or required to provide such a service. However, Section 635 allows the Commission to change what is required of a Level 2 carrier. Requiring a Level 2 carrier to petition the Commission ensures that any changes ordered by this Commission occur after a Level 2 carrier has an opportunity to be heard on the subject . In this way, a Level 2 carrier can present evidence regarding its position prior to any Commission determination requiring that Level 2 carrier to meet any Level 1 requirement. Allowing Level 2 carriers to petition this Commission prior to imposing any Level 2 standards in the Rule helps ensure that the Rule is in accordance with the due process clauses of the United States and Illinois constitutions. This requirement also allows for appellate review of a Commission decision on this issue, which is in accordance general notions of with due process. We decline to eliminate the first paragraph or Section 635.

V. Level 3 Carriers, or Carriers with Rural Exemptions

Background

Level 3 carriers are Illinois Local Exchange Carriers that have a Rural Exemption from the obligations of Section 251(c) of TA 96. (Appendix, Section 115(c); 47 U.S.C. Sec. 251(c) and (f)).

No party has objected to the provisions for Level 3 carriers.

VI. Issues Applicable to Level 4 Carriers

Background

Level 4 carriers are LECs that do not have Section 251(c) obligations under the Telecommunications Act and also are not Level 3 carriers. Level 4 carriers provide little in the way of wholesale services. Accordingly, the Rule imposes standards and remedies for those services that are involved when customers switch carriers. When a retail customer switches its services from one carrier to another, the carrier the customer switched to is called upon to provide a customer service record (a "CSR") and unbundled loop return (a "ULR"). Loss notification, the process by which one carrier notifies another carrier that a customer has switched from the notified carrier to the notifying carrier, is also involved in the switching process. (Appendix, Sec. 115; Staff Ex. 1.0 at 18). The Rule, as proposed by Staff, subjects Level 4 carriers ~~are subject~~ to service quality standards for CSRs, Unbundled Loop Returns, and Loss Notifications within specified timeframes. Thus, Level 4 carriers are required only to provide the mechanisms that allow for a smooth transition when an end user customer switches carriers. The Rule applies to those Level 4 carriers that already provide such services. (Appendix, Sec. 805). Level 4 carriers must provide these services within 24 hours and there are accompanying remedies for failure to provide these services in a timely fashion. (*Id.* at Secs. 810, 815).

The Rule also allows a Level 4 carrier to be exempt from the obligations of Level 1 and Level 2 carriers, until such time as the Level 4 carrier receives a bona fide request for a Level 2 wholesale service (a service beyond the Level 4 performance measures) and agrees to provide such services, or, when the carrier becomes legally obligated to provide such services. (*Appendix,* Sec. 820). In such an instance, that carrier may be required, after notice and a hearing, to comply with some or all of the Level 2 requirements. At such a hearing, the Commission is required to consider factors such as technical or economic feasibility, expected demand, or the cost to the carrier. (Staff Ex. 1.0 at 29).

a) Should Level 4 Standards be Imposed?

The Position of AT&T

AT&T, a Level 4 carrier, does not support the imposition of Level 4 standards. AT&T argues that Level 4 performance measures should not be imposed because Level 4 carriers have no legal obligation to offer wholesale services. AT&T seeks to change the Rule to provide that Level 4 standards are not ~~would not be~~ applicable to a Level 4 carrier unless and until the time when the carrier became required to provide unbundled services pursuant to 47 U.S.C. Sec. 251(c). AT&T also contends that Level 4 carriers should not be subject to 100% benchmarks and it seeks a modification to provide for 95% benchmarks. (AT&T Initial Brief at 12-13).

AT&T maintains that Verizon provides no support for its contention that Level 4 carriers should be subject to Level 2 requirements. According to AT&T, there is no compelling business reason to impose Level 2 requirements on CLECs, (Level 4 carriers) since CLECs do not provide wholesale services. (AT&T Reply Brief at 10).

The Position of WorldCom

WorldCom, a Level 4 carrier, finds the imposition of Level 4 performance measures to be premature. WorldCom reasons that there are ongoing 13-state CLEC-to-CLEC migration collaboratives. Thus, WorldCom seeks to wait to set benchmarks until the time when the collaborative establishes its processes ~~before benchmarks are imposed~~. WorldCom contends that it has not been determined that the same timeframe used for larger Level 1 ILECs should apply to Level 4 CLECs, whose processes are newer, or are less advanced, than those of ILECs. (WorldCom Initial Brief at l7-18).

In its Brief on Exceptions, WorldCom contends that, because Staff filed its proposal with the Level 4 requirements in its rebuttal testimony, WorldCom did not have the opportunity to respond to Staff's proposal, or, to submit evidence concerning whether the CLECs were able to comply with those standards. Thus, WorldCom concludes, essentially, that it would be unfair to impose Level 4 standards on the CLECs. (WorldCom Brief on Exceptions at 3).

AT&T/WorldCom object to SBC's contention that Level 4 penalties should be increased. They aver that no evidence was presented indicating that Level 4 carriers provide poor retail service. Also, the evidence established that at present, Level 4 carriers provide very little in the way of wholesale services. These parties also posit that Level 4 carriers should not be subjected to increased number portability requirements, as

<u>interconnection agreements usually provide for the terms of number portability. (AT&T/WorldCom Reply Brief on Exceptions at 11-14). .</u>

The Position of Allegiance

Allegiance, a group of Level 4 carriers, argues that Level 4 should not include performance standards and remedy payment requirements regarding Unbundled Loop Returns, Loss Notification and Customer Service Records ("CSRs"). (Allegiance Initial Brief at 15-18). Allegiance contends, essentially, that because most end users switch from ILEC to CLEC, there really is no current problem with loss notification from CLEC to ILEC, and there is no need to "fix" a problem that does not exist. (*Id.* at 18, Reply Brief at 24). Allegiance also contends that the need to provide Unbundled Loop Returns and CSRs is likely to be infrequent, and it does not justify, on a cost basis, establishment of a sophisticated process for executing these functions.

Allegiance points out that currently, Level 1 carriers control in excess of 80% of the Illinois access lines and they have sophisticated, automated OSS systems, procedures and methods. In contrast, Allegiance points out, Level 4 carriers, which are called upon much less frequently to provide wholesale services, generally have manual systems that are much less sophisticated than those of Level 1 carriers. (Allegiance Initial Brief at 15-18; *See also,* McLeod Brief on Exceptions at 6).

Allegiance further posits that Level 4 carriers do not charge Level 1 carriers for Unbundled Loop Returns and CSRs, thus, the Rule would require Level 4 carriers to give Level 1 carriers a credit for a service, for which, the Level 4 carriers were not imposing a charge in the first place. (*Id.* at 16). Allegiance is of the opinion that therefore, Level 4 carriers will begin to charge Level 1 carriers for these two services, and the retail customers will be required to bear the costs. In contrast, Allegiance points out that a Level 1 carrier in the same situation will receive revenues, when a customer switches to another provider, in the form of provisioning UNEs or other wholesale-for-retail services. (*Id.* at 17-18).

Allegiance views Staff's evidence that the Commission receives many, many complaints regarding the double-billing that occurs after a customer has switched from one carrier to another as "anecdotal," as only "bad" customer experiences come to Staff's attention. (Allegiance Reply Brief at 24).

The Position of McLeod

On Exceptions, McLeod contends that because SBC and Staff presented only "hypothetical evidence" regarding customer-related issues involved in CLEC-ILEC migration, the ALJPO erroneously concluded that Level 4 carriers should be subject to Level 4 measures, standards and remedies. McLeod further asserts that it is "putting the cart before the horse" to impose such standards and remedies prior to the time in which CLECs establish protocols for CLEC to CLEC migration. (McLeod Brief on Exceptions at 3-8).

McLeod also argues that loss notification standards should not be included in the Rule because, according to McLeod, the definitions of "provisioning carrier" and "loss notification" provide that even when a customer switches from a Level 4 carrier to a Level 1 or Level 2 carrier, the Level 1 or Level 2 carrier, not the Level 4 carrier, will be responsible for loss notification. McLeod posits that because currently, there is no evidence that CLECs provide Loss Notification, they should not now be required to do so. (*Id.* at 7).

The Position of Staff

Staff points out generally, ~~the Rule is~~ Level 4 requirements are designed to protect the end user consumer, for whom, there is no distinction between a CLEC and an ILEC. (Staff Reply Brief at 60-61). When Staff devised the performance measures applicable to Level 4 carriers, it did not contemplate the use of sophisticated OSS systems. Rather, Staff devised the timeframes in the Rule for simple systems. Staff additionally avers that the standards and remedies it imposes on Level 4 carriers are minimal. Staff is of the opinion that no further deference to the CLECs is warranted.

On Exceptions, Staff maintains that the dollar amount of the remedies was raised by Staff in its direct testimony. At that time, the parties were afforded the opportunity to contest the amount of Level 4 remedies. However, no party questioned the amount, and no party or offered alternative remedy amounts. (Staff Reply Brief on Exceptions at 26-27).

Staff further opines that when comparing the dollar amount of the remedies for Level 4 carriers with the payments made for substandard performance pursuant to SBC's Plan, SBC glosses over the intricacies of hypothesis testing and confidence levels, which are embedded in SBC's Plan. (Staff Reply Brief on Exceptions at 27). Staff avers that the remedy amount for missed standards for Level 4 carriers will be reviewed in two years. In Staff's view, that is the proper time for determining whether the dollar amount of the remedies is too low. At that time, the Commission can assess the performance of the Level 4 carriers and determine whether the dollar amount of the remedies is sufficient incentive for them to comply with the Rule. (Staff Reply Brief on Exceptions at 28).

The Position of Verizon

Verizon points out that from an end user's perspective, it does not matter whether a problem with telecommunications service is caused by a Level 1 carrier or a Level 4 carrier. Verizon proposes to eliminate the Level 4 classification and hold all Level 4 carriers to the standards for Level 2 carriers. Citing the testimony of its witness, Louis Agro, Verizon contends that there is no reason in the record to support the premise that Level 4 carriers should be treated differently than Level 2 carriers. In the alternative, Verizon proposes that the penalties associated with Level 4 failures should be increased to the level that is equal to Level 2 penalties. Verizon additionally argues that imposing differing penalties on different carriers is disparate treatment. (Verizon Initial Brief at 25, 26).

Verizon avers that, in effect, the CLECs are asserting that they should be allowed to provide services in any manner, without regard to the end users. Verizon further argues that WorldCom has not explained the connection between the collaboratives it mentions and Staff's "watered-down" requirements for Level 4 CLECs. (Verizon Reply Brief at 29-30).

On Exceptions, Verizon posits that it has standing to contest the standards for Level 4 carriers because disproportionate regulatory burdens can have an impact on it. With regard to Unbundled Loop Returns, it avers that if a Level 4 carrier fails to return a loop in a reasonable time, it cannot switch a new customer over. Verizon seeks to increase the penalties imposed on Level 4 carriers to an amount equal to the penalties in Level 1 carriers' Wholesale Service Quality Plans. (Verizon Brief on Exceptions at 4; 28).

The Position of SBC

The Rule, SBC opines, gives Level 4 carriers a "blanket exemption" from wholesale standards, such as unbundled loop returns, CSRs, and like standards. (SBC Initial Brief at 26-30). SBC argues that the CLECs are asking the Commission to turn its back on the serious problems that have prevented thousands of consumers from effectively changing local service providers. SBC posits that CLECs are required by law to facilitate consumers' choices, citing 220 ILCS 5/13-513(5) and 13-514(6). (SBC Reply Brief at 12-13).

SBC points to testimony it proffered, of Ms. Spieckerman, that, in SBC's experience, the CLECs fail to timely provision CSRs 86% of the time. It concludes, therefore, that the Commission should ~~impose the Rule's requirement~~ require that CSR returns must take place within 24 hours. SBC also cites the testimony of Staff and Ms. Spieckerman indicating that CLECs frequently fail to timely return loops, and, failure to return loops can result in delay and inefficiency. SBC proposes, however, that ~~large (20 or more)~~ when orders involve the return of 20 or more ~~loop~~ returns, the requirement should be 48 hours, instead of the current standard of 24 hours. (SBC Initial Brief at 27).

SBC further avers that failure to timely provide a Firm Order Confirmation is also problematic, as failure to timely provide such a document can delay the processing of an order or, it can result in a customer having to change telephone numbers. SBC seeks to impose a requirement on Level 4 carriers for Firm Order Confirmations of 24 hours, with 48 hours for orders involving 20 or more lines. (*Id.* at 28-29).

Citing the testimony of AT&T witness Ms. Moore, SBC argues that the record does not contain evidence supporting Allegiance' contention that meeting the Level 4 requirements would require sophisticated systems and processes. (SBC Reply Brief at 13; Tr. 178-82). SBC maintains that if any carrier is truly too small or too unsophisticated to provide support for customer migration, that carrier probably should not have been granted a certificate of authority to provide telecommunications service. (SBC Reply Brief at 14).

On Exceptions, SBC contends that the Level 4 remedies should be increased from $1 to $25 per occurrence because, according to SBC, Level 4 carriers do not provide their retail customers with adequate service. It asserts that the current penalty amount is not sufficient to encourage Level 4 carriers to comply with the Rule. According to SBC, problems with the service provided by Level 4 carriers cause significant delays in processing customers' orders. SBC reasons that because remedies in other section of Section 13-712 are higher, Level 4 remedies should be increased. (SBC Brief on Exceptions at 25-31).

Also on Exceptions, SBC posits that CLECs should be required to port numbers in less than 24 hours for less than 20 numbers and 48 hours for more than 20 numbers. (*Id*).

Commission Analysis and Conclusion

Subjecting Level 4 Carriers to Level 2 Performance Measures

The evidence in this docket is replete with facts establishing that it is not in the best interest of the ultimate consumers, or the carriers, to treat all carriers in the same manner. There is simply no evidence to justify treating Level 4 carriers, which are CLECs, the same as Level 2 carriers that, by definition, are ILECs. The evidence established that Staff has carefully and thoughtfully crafted a Rule that ensures quality service to the end user customer, without unduly burdening the carriers, through the use of a four-level approach.

SBC's contention that level 4 carriers have a "blanket exemption" from wholesale standards is incorrect. Sections 805 and 810 require unbundled loop returns, loss notification and CSRs of Level 4 carriers, to the extent those carriers provide those services. (Appendix, Secs. 805, 810). Section 815 imposes consequences for failure to timely provide those services. (*Id.* at 815). Therefore, Level 4 carriers do not have a "blanket exemption" from wholesale standards.

We also decline to adopt Verizon's proposal, which ignores altogether the need for different approaches for different carriers. Verizon's argument that Level 4 carriers should incur Level 2 penalties lacks merit for several reasons. Verizon, a Level 1 carrier, is totally unaffected by the penalties imposed on Level 4 or Level 2 carriers. Therefore, it does not have standing to contest the penalties imposed on those carriers. (*People v. Malchow,* 193 Ill.2d 413, 425, 793 N.E.2d 433 (2000)). Moreover, while Verizon argues that carriers should not be subject to "disparate treatment," it cites no authority in support of this legal theory.

While Verizon argues that all of the Level 4 standards should be changed, it cites only one instance in which it will by impacted by the performance of a Level 4 carrier—when a Level 4 carrier fails to return a loop in an untimely fashion. There is, however, no evidence that the current standards in the Rule are not adequate in this regard. Moreover, Verizon does not dispute that Level 4 carriers, at present, have very little wholesale business.

Finally, we have already determined that the record is replete with evidence establishing a rational basis for categorizing carriers in the Section of this order addressing Level 1 Wholesale Service Quality Plans (*See* Sec. II(a)). The evidence established that currently, most Level 4 carriers do not provide much in the way of wholesale service. Also, the CLECs' systems are ~~different,~~ generally, less elaborate than those of Level 1 carriers. Thus, there is a rational basis for imposing less measures on Level 4 carriers and Verizon's disparate treatment contention fails.

The Arguments of Allegiance and other CLECs

The evidence demonstrated that Staff developed the Level 4 standards for simpler, manual transactions. Therefore, the CLECs' contention that they will have to purchase costly systems to comply with the performance measures is without merit. There is no evidence indicating that the CLECs are unable to meet these standards. We note that the Rule provides very limited and very simple measures and remedies. If the CLECs desire to compete with the ILECs, there is no reason why they should not be able to adhere to some performance measures so that end users are assured of some minimal quality standards.

We disagree with Allegiance's contention that there is no current "problem" with regard to CLEC-ILEC migration, and therefore, Level 4 CLECs should not be required to provide the services required of Level 4 carriers. The evidence established that end user customers suffer the inevitable consequences of untimely notification, such as being billed by two carriers for the same time period. We are also not persuaded by Allegiance's contention that Level 4 carriers' customers will suffer if Level 4 is imposed, as Level 4 carriers may pass on the payments they make pursuant to the Rule. The payments pursuant to the Rule are only for substandard service, and they are nominal.

As Staff points out, the evidence established that the amount of complaints it has received from the end user consumers regarding double-billing after switching carriers is alarming. Moreover, it is obvious that problems involved in switching carriers will involve CLEC activity; switching, in the context used here, is usually ~~can only be~~ ILEC-CLEC, or *vice-versa*. We, therefore, shall not change the Rule with regard to Level 4 standards, except as is provided below.

With regard to WorldCom's argument that regulation of Level 4 carriers should be delayed until completion of the 13-state collaborative is completed, we note that this collaborative may not produce legal obligations on carriers. Moreover, WorldCom did not provide indicia as to when the collaborative would be completed. End user consumers should not have to wait any further to have some assurance of performance quality.

We are also not persuaded by WorldCom's contention that, because Staff placed its proposed Rules regarding Level 4 carriers in its rebuttal pre-filed testimony, WorldCom was precluded from introducing evidence concerning whether the CLECs are able to comply with the Level 4 standards. WorldCom is correct in asserting that rebuttal is not for the purpose of introducing new evidence. However, a status hearing convened in this docket after Staff filed its rebuttal testimony. That status hearing was held to address pretrial motions and resolve any issues that arose before trial. At that status hearing, WorldCom did not request leave to file surrebuttal testimony, move to strike Staff's testimony or otherwise raise the argument it makes now. Additionally, WorldCom did not raise the issue at trial. WorldCom was not precluded from presenting evidence regarding whether CLECs are able to comply with Level 4 standards.

Additionally, with regard to AT&T's arguments regarding benchmarks, as was stated with regard to Citizens' argument that 90% or 95% benchmarks should be imposed on Level 2 carriers, the evidence established that such benchmarks are not very accurate for lower volumes of transactions. (*See,* Sec. VI(b), herein). Also, customer end user quality assurance is not benefited through the use of AT&T's threshold, whether a Level 4 carrier has Section 251 obligations. It makes little difference, if any, to the end-user consumer if a Level 4 CLEC becomes subject to Section 251 requirements. Therefore, we decline to adopt AT&T's suggested threshold and its proposed benchmarks. In summation, we are not adopting any of the parties' suggested changes regarding the imposition of Level 4 standards or remedies.

McLeod's reference to the evidence presented by Staff and SBC on customer issues involved when customers switch carriers as "anecdotal" or "hypothetical" is incorrect. Alcinda Jackson's testimony, essentially, was that, based on her experiences with consumer complaints at this Commission, consumers would benefit if all carriers were required to provide CSRs, ULRs and Loss Notification. (Staff Ex. 5.0 at 4-7). Moreover, Ms. Spieckerman also testified that CLEC performance of these standards is inadequate. (See, e.g., SBC Ex. 3.0 at 7-9).

We also disagree with McLeod's construction of the definitions of "Loss Notification" and "provisioning carrier," as we do not believe that construction of these to provisions renders an ILEC responsible for loss notification, even when a customer switches from a CLEC to an ILEC. A "provisioning carrier" is defined in the Rule as "[t]he carrier provisioning or offering to provision a wholesale services to another carrier." (Appendix at 105). "Wholesale services" are defined as:

> those telecommunications services that are subject to the Commission's jurisdiction that one carrier sells or provides to another, as a component of, *or for the provision of* telecommunications services to end users.

(*Id*). (Emphasis added). Loss notifications, ULRs and CSRs are used for the provision of telecommunications services. So it is abundantly clear, the definition of "Wholesale Service" shall be amended as follows:

> [A]ny telecommunications services that are subject to the Commission's jurisdiction that one carrier sells or provides to another, as a component of, or for the provision of telecommunications services to end users, including, but not limited to, any wholesale services that are subject to wholesale service quality standards pursuant to this Rule.

SBC's Arguments

While it could appear that SBC has no standing to make suggestions regarding the standards imposed on Level 4 carriers, the gist of its argument is that because a consumer has no idea what is causing a problem (*i.e.,* double-billing) for that consumer after a switch, SBC is required to "deal with the consequences" of untimely loop returns and the like. SBC has standing to address the measurement imposed, as those measurements have some impact on what situations SBC employees may have to "deal with."

SBC's proposal to amend the Rule to allow 48 hours for the return of 20 or more loops is well-taken. Section 810 is amended to provide:

> Level 4 carriers shall be subject to the following wholesale service measures and standards as provided below for the following services, to the extent the carrier offers or provides such services:
>
> a) Unbundled Loop Return for less than 20 Loops -within 24 hours
> for 20 or more loops -within 48 hours

(*See,* Appendix, Sec. 810).

However, we decline to require Level 4 carriers to provide firm order confirmations at this time. Staff developed the Rule after extensive workshops were conducted and Staff is of the opinion that imposition of firm order confirmations is not warranted. For the same reason, we also decline to impose number portability standards on Level 4 carriers at this time. Moreover, there is no evidence that the time intervals SBC proposes are feasible or reasonable. We note that Staff witness Alcinda Jackson's testimony establishes that Commission Staff considered including standards for number portability. Staff declined to do so, as it was not aware of any problems relating to this issue. (*See,* Staff Ex. 11, at 16).

We are also not persuaded by SBC's argument that Level 4 penalties are too low. Because carriers receive no compensation from the types of services at issue here, it is not possible to use a market price or demand price for these services. Staff's determination that $1 is the appropriate remedy is based on its effort to balance the need for the services with the cost of providing these services. (*See, e.g.,* Staff Ex. 4.0 at 13-16, discussing Staff's determination to impose the same penalties for the same types of services on Level 2 carriers).

b) Section 815: (Renumbered as 820) Conversion from Level 4 to Level 2

The Position of Allegiance

Section 820 requires conversion from Level 4 to Level 2 when a carrier has become obligated to provide ~~for~~ services outside the scope of Level 4, or, when it has received a request for such services. Allegiance seeks to limit conversion to situations in which Level 4 carriers become obligated to perform such services. Allegiance argues that it is unlikely that a CLEC (a level 4 carrier) would ever voluntarily agree to provide wholesale services to another carrier, if that CLEC would thus be subject to regulatory requirements regarding those services. Allegiance also contends that there is no good policy reason for applying Level 2 requirements to a Level 4 carrier ~~when the Level 2 carrier has voluntarily agreed to provide services~~ because there will always be a competitor with that CLEC—the ILEC. Allegiance also avers that the fact that a CLEC is providing wholesale service on a voluntary basis means, *ipso facto,* that the services will only be provided pursuant to an arm's-length agreement that is mutually acceptable. (Allegiance Initial Brief at 12-15).

The Position of McLeod

On Exceptions, McLeod argues that whether a Level 4 carrier is able to comply with the Level 2 standards is irrelevant. Instead, the issue is whether a Level 4 carrier, who is not obligated pursuant to TA96 to provide wholesale services, should be held to the same standards as those imposed on a Level 2 carrier. (McLeod Brief on Exceptions at 13-14).

The Position of WorldCom

WorldCom argues that a petition for reclassification of a Level 4 carrier to a Level 2 carrier should be considered only if that Level 4 carrier's TA96 exemption is terminated. (*See,* 47 U.S.C Sec. 251(h)(2)). ~~Stated another way,~~ WorldCom desires to have the Rule provide for reclassification only when Level 4 carriers, CLECs, are required by law to provide the services in question, so that Level 4 carriers are prepared to offer those services. (WorldCom Initial Brief at 15).

The Position of the IRCA

The IRCA points out that generally, the Rule does not require Level 4 carriers to adhere to standards for Level 2 carriers. However, pursuant to the Rule, Level 4 carriers become subject to Level 2 requirements when they receive a request for wholesale services. (IRCA Reply Brief on Exceptions at 10-11; Appendix at Sec. 820).

Commission Analysis and Conclusions

We decline to change the Rule to allow for Level 4-Level 2 conversion only when a CLEC is legally required to provide the applicable services. We are not persuaded by the argument that the mere threat of regulation of the services in question would make most CLECs decline to voluntarily provide wholesale services. Other than being encumbered by regulation, the CLECs have not provided a reason for changing the Rule. We note that the Level 4 CLECs have not provided evidence indicating that they are unable to comply with the Rule. And, we disagree with McLeod that the focus here should be on whether a Level 4 carrier should be held to the same standards as those imposed on a Level 2 carrier. The focus is, rather, what can be done to ensure that all consumers do not receive substandard service. Certainly, holding Level 4 carriers to Level 2 standards when those Level 4 carriers provide Level 2 services aids in meeting that goal.

We also note that Section 820, which governs the conversion process, requires the Commission to consider several factors, such as the technical and economic feasibility of compliance with Level 2 Requirements and whether the benefits accrued justify the costs incurred in order to comply with Level 2 requirements. (Appendix, Sec. 820). Level 4-Level 2 conversion is not automatic, and it allows a CLECs to present evidence as to why it should not be held to Level 2 requirements~~, resulting in an order that only requires compliance with some of the Level 2 requirements~~. (*Id.* at Sec. 820(b)).

Findings and Ordering Paragraphs

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

(1) the Commission has jurisdiction over the subject-matter and of the parties herein;

(2) the recital of fact set forth in the prefatory portion of this order are supported by the record and are hereby adopted as findings of fact;

(3) the conclusions of law set forth in the prefatory portion of this order are supported by the evidence;

(4) for the reasons set forth herein, the proposed Rules designated as 83 Ill. Adm. Code 731, as reflected in the attached Appendix, should be submitted to the Secretary of State to begin the first notice period;

IT IS THEREFORE ORDERED that the proposed rules designated as 83 Ill. Adm. Code 731, as reflected in the attached Appendix, shall be submitted to the Secretary of State pursuant to Section 5-40 of the Illinois Administrative Procedure Act.

IT IS FURTHER ORDERED that this order is not final; it is not subject to the Administrative Review Law.

By Order of the Commission this 7th day of January, 2004.

(SIGNED) EDWARD C. HURLEY

Chairman